IN THE
MISSOURI SUPREME COURT

WALTER BARTON,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 93371**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
CASS COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE R. MICHAEL WAGNER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction of this 29.15 death penalty appeal. Art. V, Sec.3, Mo. Const.

STATEMENT OF FACTS

A. Case Background

Following Gladys Kuehler's death, Christian County tried Mr. Barton five times. In the first three trials, A.A.G. Robert "Bob" Ahsens and Christian County P.A. Timothy "Tim" McCormick represented respondent (Ex.240p.1;Ex.241p.cover;Ex.242p.1).[1] Ahsens and Christian County P.A. Mark Orr prosecuted the fourth(Ex.244p.cover). A.A.G. Michael Bradley and Christian County P.A. Ron Cleek prosecuted the fifth(Ex.247p.Index). David Bruns, Brad Kessler, and Kim Freter represented Barton at the fifth.

After the first jury was sworn, a mistrial was declared because Ahsens hadn't endorsed anyone. *State v. Barton*,936S.W.2d781,782(Mo.banc1996). The second jury hung. *Id.*782.

Barton's third trial conviction was reversed because counsel's closing argument was improperly limited. *Barton*,936S.W.2d at 783-88. This Court found: "The prosecution's theory of the case was that Barton killed Mrs. Kuehler in her trailer home sometime between 3:00 and 4:00 in the afternoon." *Id.*782. The trial court improperly sustained Ahsens' objection to argument relying on facts supporting

[1] The record is: (1) 29.15 Legal File (29.15L.F.); (2) 29.15 transcript (29.15Tr.); and (3) 29.15 Exhibits (Ex.#p.#) - exhibit number followed by page (p.) of that exhibit. Some exhibits combine letters and numbers.

innocence because Barton couldn't have committed the crime between 3:00 and 4:00. *Id.*782-85(Ex.242p.870-71).

This Court affirmed the fourth trial Judge Scott presided over. *State v. Barton*,998S.W.2d19(Mo.banc1999). The fourth trial's 29.15, was remanded and this Court vacated Scott's appointment. *Barton v. State*, 76S.W.3d280,281(Mo.banc2002).[2] On remand, Judge Sims vacated Barton's conviction and respondent didn't appeal. *State v. Barton*, 240S.W.3d693,696(Mo.banc2007)(Ex.224p.82-124).

Sims' January 30, 2004, findings (Ex.224p.82-124) noted Katherine Allen met Barton when both were Lawrence County jail inmates(Ex.224p.92). Allen's fourth trial testimony was Barton twice got angry with her and allegedly stated: "I will kill you like I killed her"(Ex.224p.92).

Sims found "no evidence" Allen's criminal history was disclosed and **didn't believe Ahsens' testimony** he disclosed it(Ex.224p.97-98). In contrast, defense counsel testified he never received Allen's criminal history(Ex.224p.98). Sims found Ahsens failed to disclose these cases: (1) three bad check; (2) three theft; (3) five forgery; (4) one criminal conversion; and (5) one escape(Ex.224p.98-99). Sims also found Ahsens failed to disclose Allen's many aliases, birthdates, and Social Security numbers(Ex.224p.99-100).

[2] Judge Scott presided over trials #1-#4 and Judge Dandurand #5(Ex.247p.4).

At that 29.15, a letter sent from Cass County A.P.A. Candace Cole to Ahsens revealed a Cass County forgery case against Allen was dismissed in exchange for testifying against Barton(Ex.224p.100). Sims found Ahsens failed to disclose that dismissal(Ex.224p.100). Sims found: "[b]ecause of the letter from Candace Cole to Mr. Ahsens, it is clear that Mr. Ahsens was aware, prior to trial, that Ms. Allen had received consideration for her testimony."(Ex.224p.100-01). Getting Missouri charges dismissed would've informed the jury Allen had a strong motive to testify for respondent and highlighted bias(Ex.224p.101).

Sims found Allen's Indiana charges attorney was informed by Ahsens' investigator, Dresselhaus, that if Allen agreed to testify against Barton her Missouri charges would be dismissed(Ex.224p.100). Sims noted Allen's Indiana attorney's testimony was uncontroverted and Sims inferred respondent's not calling Dresselhaus evidenced his testimony would've been the same(Ex.224p.100).

Sims ruled that if Allen's complete history had been disclosed cross-examination would've been more effective showing her deception offenses history, including forgery and credit card fraud(Ex.224p.101). Allen's actual criminal history would've established she minimized it(Ex.224p.101). Sims found Ahsens failed to correct Allen's perjurious false impressions about her convictions(Ex.224p.102-03).

Sims found Allen's testimony was "critical to the prosecution's case" not only because she claimed Barton admitted committing the homicide, but also because Barton allegedly threatened her(Ex.224p.101-02).

In February, 2004, after Sims' findings, Ahsens exchanged e-mails with A.A.G. Bruce, this 29.15 findings' author(29.15L.F.9-10,460,688-744,938-46;29.15Tr.566-67). Ahsens wrote Bruce that retrying Barton before Sims was problematic because "He is not t [sic] the top of my hit parade either."(29.15L.F.460). Bruce responded: "I suspect that the decision was based on the judge's [Judge Sims] dislike of his predecessor, who tried the case, [Judge Scott] as more than the merits."(29.15L.F.460)(bracketed material added).

Barton's fifth trial conviction, the subject of this 29.15, was affirmed. *State v. Barton*,240S.W.3d693(Mo.banc2007). This Court found "frivolous" the argument it was error to fail to exclude blood spatter expert Newhouse's testimony on the grounds he was unqualified and didn't follow accepted scientific methods. *Id.*704-05.

B. Prior Relevant Proceedings

1. Preliminary Hearing

At the January, 1992, preliminary hearing, Gladys' neighbor, Carol Horton, testified that when she went to Gladys' at 4:15 p.m. a radio **was playing**(Ex.238p.19).

2. Second Trial - Hung Jury

The second trial in October, 1993, conducted in Christian County, resulted in a hung jury(Ex.241p.1). Farmington Correctional inmate Larry Arnold, testified on October 26, 1993(Ex.241p.Index and 322). When Arnold testified, he was serving sentences for second degree murder and burglary(Ex.241p.322).

Arnold testified he'd been housed with Barton in the Christian County Courthouse jail in Ozark(Ex.241p.322-23). Ahsens elicited from Arnold that in

exchange for "truthful" testimony Ahsens would write a favorable parole board letter(Ex.241p.323). Arnold hoped Ahsens' letter helped(Ex.241p.335).

Arnold testified Barton admitted stabbing and killing Gladys(Ex.241p.324-25).

After the second trial, Ahsens sent juror Smalley a handwritten note with Barton's prior conviction documents and booking picture attached stating: "Mr. Smalley - I thought you might like to share this information with your holdouts. It is the evidence you would have seen in Phase II. Bob Ahsens (314) 751-9186."(Ex.251;29.15Tr.563-64).

3. Third Trial - Reversed Limited Closing Argument

The April, 1994 third trial occurred in Christian County in Ozark(Ex.242p.410-11). Arnold, still confined at Farmington, testified April 12, 1994(Ex.242p.778-79;Ex.242 Index pgs.F-G).

Arnold recounted while serving fifteen years for murder he'd been confined in Christian County with Barton(Ex.242p.779-80,790). Arnold testified Barton admitted stabbing and killing Gladys(Ex.242p.780-81). Ahsens asked Arnold if Arnold "ask[ed] [Ahsens] for anything"(Ex.242p.781). Arnold testified he only asked for a favorable parole board letter, which Ahsens wrote(Ex.242p.781).

Ahsens called Ricky Ellis to testify he was confined with Barton in Christian County and Barton said he was going to have Arnold killed for claiming Barton admitted killing Gladys(Ex.242p.804-06).

Ahsens called Allen to testify she was confined with Barton in Lawrence County(Ex.242p.808-10). According to Allen, Barton admitted killing Gladys because he was angry with Gladys in the same way that he was angry with Allen(Ex.242p.810). Allen **didn't specify a particular number of times** Barton made such statement(Ex.242p.808-13). Allen testified to bad checks and theft convictions(Ex.242p.809,811-12).

Ahsens called Craig Dorser to testify he was confined with Barton in Lawrence County(Ex.242p.813-16). Dorser represented Barton admitted killing Gladys and Barton said he licked Gladys' blood and liked its taste(Ex.242p.815-16).

Ahsens concluded both initial and rebuttal guilt arguments urging the jury convict based on the four snitches' testimony(Ex.242p.865-66,890-91).

4. Fourth Trial - Vacated 29.15 Unappealed

The fourth Benton County trial occurred in April, 1998(Ex.244p.41).

Arnold testified outside the jury's presence he intended to refuse to testify(Ex.244p.688-89). Arnold's third trial's testimony was read to the jury(Ex.244p.727-53 reading from Ex.242p.778-802).

Ellis testified that while confined in Christian County he heard Barton say he was going to have Arnold killed(Ex.244p.766-67).

Allen testified Barton threatened her **twice** stating he'd kill Allen like he'd "killed her"(Ex.244p.770-71).

Dorser represented Barton admitted stabbing and killing Gladys and repeated the purported "licked and liked"(Ex.244p.776,778).

Respondent called expert William Newhouse to testify blood on Barton's clothing was high velocity spatter, not inadvertent transfer(Ex.244p.704-25).

During defense guilt, Pacific prison's library inmate law clerk, Rentschler, testified Arnold told him he lied against Barton to improve parolability(Ex.244p.781-87). Arnold told Rentschler he didn't want to lie again and wanted refusing to testify advice(Ex.244p.786).

Phillip Reidle testified he met Allen and Barton in Lawrence County's Jail and Allen had a reputation as a liar(Ex.244p.788-91).

Defense counsel also called in guilt Gene Gietzen as an intended blood stain/spatter expert(Ex.244p.843,852,879-80). Ahsens and the court voir dired Gietzen and Gietzen was ruled unqualified(Ex.244p.848-50,855-79). Despite that finding, it was agreed Gietzen could give limited testimony(Ex.244p.879-80). Gietzen testified there was significant quantities of blood on and around Gladys' body(Ex.244p.882-83). There was little room between where blood was found and Gladys' body(Ex.244p.883). The assailant must've been particularly close to Gladys(Ex.244p.885). The amount of blood on Barton's clothing was less than expected taking into account the scene's compactness and number of stab wounds(Ex.244p.885).

In Ahsens' initial guilt closing argument, he argued Barton's shirt contained high speed blood spatter and not contact transfer caused by Barton pulling Gladys' granddaughter, Debbie Selvidge, away from Gladys' body(Ex.244p.896-98). Ahsens argued forensic evidence against Barton was "overwhelming" (Ex.244p.902) and the

sheer number of snitches proved Barton did it(Ex.244p.899-900). Ahsens highlighted Dorser's "licked and liked"(Ex.244p.900).

Defense counsel argued in guilt there wasn't enough time for Barton to kill Gladys(Ex.244p.904,924). There was blood transfer, not spatter(Ex.244p.914).

In rebuttal guilt, Orr argued Newhouse established blood on Barton's shirt was high impact spatter(Ex.244p.927). Orr argued Barton told Arnold he killed Gladys(Ex.244p.927). Orr re-highlighted all four snitches' testimony as establishing Barton committed this offense and Dorser's "licking and liking"(Ex.244p.927-28).

C. Fifth Trial Proceedings

1. Pretrial

Prior to the fifth Cass County trial commencing March 6, 2006, counsel moved to dismiss/prohibit death(Ex.224p.77-124,127-32;Ex.247p.1-26,42;Ex.247p.Index 3). The motion was filed January 31, 2006, and first taken-up February 3, 2006(Ex.224p.77;Ex.247p.1-26). The relief requested was premised on repeated state misconduct(Ex.224p.80;Ex.247p.1-26).

Judge Dandurand said he was giving the motion "serious consideration," and was "looking at this pretty strongly"(Ex.247p.17,21). Dandurand stated respondent's failure to appeal Judge Sims' decision was "an important fact" in considering the motion(Ex.247p.21). Dandurand added that if the relief sought was appropriate as a matter of law, then he was "darn sure going to consider it based upon the history of this case"(Ex.247p.23-24). Dandurand was "serious" about considering prohibiting

respondent seeking death because Barton was prejudiced, but disinclined to dismiss(Ex.247p.26-27).

On the first day of trial, March 6, 2006, Dandurand revisited the motion(Ex.247p.42-43). Dandurand found Barton was "prejudiced by having to come back over and over again" because each time respondent's case improved adding snitches(Ex.247p.45). Dandurand noted: "[t]he only time the jury got to hear a fair crack" it hung(Ex.247p.45). Dandurand added: "So it is almost unarguably that the Defendant has been prejudiced. The Defendant has been prejudiced."(Ex.247p.45). Dandurand left ruling in abeyance, but if forced to rule he'd prohibit death(Ex.247p.45-46).

During the same March 6, 2006, pretrial hearing, defense counsel informed Dandurand they'd received a letter from Arnold(Ex.247p.46-47). Arnold's letter was dated "1-28" (postmarked 1/30/06) with the envelope addressed to Kessler's office(Ex.207). Arnold's letter urged defense counsel speak with him(Ex.247p.46-47). Kessler said he didn't keep the original, but gave it to P.A. Cleek(Ex.247p.46-47). Kessler told Dandurand that A.A.G. Bradley had indicated respondent would talk to Arnold about his letter(Ex.247p.46). Kessler informed Dandurand he needed to know what respondent learned(Ex.247p.46). Bradley stated they never spoke to Arnold because they "got busy"(Ex.247p.46). Kessler read part of the January 28th letter which stated Arnold had "some information that would help you on that defense, some crooked stuff on the handling of witnesses…."(Ex.247p.47).

Kessler noted at the fourth trial Arnold was unavailable, having invoked the Fifth, and his prior testimony was read(Ex.247p.48-50). Dandurand noted Arnold wasn't wanting to take the Fifth, but wanted to talk to defense counsel(Ex.247p.49).

2. Respondent's Opening

Respondent maintained the offense occurred between 3:00-4:00 p.m.(Ex.247p.433-36). Respondent previewed four inmates, Arnold, Ellis, Allen, and Dorser, would testify and their prior testimonies were highlighted(Ex.247p.441-42). Bradley told the jury Arnold would testify Barton admitted "he killed an old lady by cutting her throat, stabbing her, cutting an X on her"(Ex.247p.441).

3. Respondent's Case

Carol Horton lived at Riverview Mobile Park in Ozark, Missouri on October 9, 1991, about 75 feet from Gladys(Ex.247p.447,451). Horton helped with Gladys' chores because she walked with a cane(Ex.247p.453-54). Horton last saw Gladys at 11:00 a.m.(Ex.247p.455). Barton was at Horton's trailer from approximately noon to 2:00 p.m. with a relaxed demeanor(Ex.247p.452-53,456).

At 2:00, Barton went to Gladys' to borrow $20.00(Ex.247p.452-53,456-57). Barton returned to Horton's at 2:15 and stayed until 3:00(Ex.247p.457-58).

At 3:00, Barton went back to Gladys' and returned to Horton's at 4:00(Ex.247p.458-59). Barton used the bathroom for ten minutes(Ex.247p.459-61). Barton said he'd been working on a car(Ex.247p.459-61). Barton no longer appeared relaxed(Ex.247p.460-61).

Dorothy and Bill Pickering owned Riverview(Ex.247p.609,618). Gladys managed Riverview and collected rents(Ex.247p.609-10,618). At about 2:00, the Pickerings stopped by Gladys' to pick-up rent payments and were there 5-10 minutes(Ex.247p.610-12,619-20). Bill Pickering phoned Gladys about 3:15 and a male answered stating she was in the bathroom(Ex.247p.620-22).

Teddy Bartlett lived at the trailer park and stopped to see Gladys between 2:00-2:45(Ex.247p.614-16,630-31). While Bartlett was at Gladys', a group of men, including Barton, were around a pick-up truck nearby Gladys'(Ex.247p.617,631-32).

Horton went to Gladys' about 4:15, but Gladys didn't answer the door and everything was "**silent"**(Ex.247p.461-63)(emphasis added). Gladys normally took an afternoon nap and Horton assumed Gladys was asleep(Ex.247p.463-64). Before Horton left for Gladys', Barton discouraged her going because Gladys was napping(Ex.247p.462-63). Horton returned to her trailer at 4:30(Ex.247p.464). Barton was at one of Horton's neighbors and he came over and repaired Horton's porch and left(Ex.247p.464-65).

Horton returned to Gladys' again, but there was still no response and Horton went home(Ex.247p.465-66). At 6:00-6:30, Gladys' granddaughter, Debbie Selvidge, came to Horton's(Ex.247p.466). Selvidge had tried phoning Gladys since 4:00(Ex.247p.466-67). When Selvidge came over, Horton saw Barton who'd been at Horton's next door neighbor(Ex.247p.466-67). Horton and Selvidge went by Gladys'(Ex.247p.466).

Selvidge spoke many times daily with Gladys(Ex.247p.502-03). Gladys' habit was to nap from 2:00-3:00(Ex.247p.505). Selvidge and Gladys phoned one another while watching the Povich show(Ex.247p.503). Selvidge last spoke to Gladys at 2:30 on October 9, 1991(Ex.247p.505). Selvidge tried phoning Gladys at 4:00 when Povich started, but couldn't reach her and that worried Selvidge(Ex.247p.505-06).[3] Selvidge went to Gladys' at 4:00, getting no response(Ex.247p.506-08).

At 7:00 p.m., Barton was at Horton's neighbor's and Selvidge asked Barton to go with them to check on Gladys(Ex.247p.466-67). They knocked on Gladys' door, but got no response(Ex.247p.470-71). Officer Hodges was nearby and he unsuccessfully attempted to get inside(Ex.247p.471).

A locksmith opened the door(Ex.247p.472-73,512-13). Selvidge said Barton urged her not to go down the hall towards Gladys' bedroom(Ex.247p.516).

Selvidge found Gladys' body in her bedroom(Ex.247p.477). Selvidge was standing in the bedroom, Horton was at the bedroom door, and Barton was behind Horton(Ex.247p.478-79,513-14,516). Horton reported that when Selvidge reached down to touch Gladys, Horton told her not to and Selvidge didn't(Ex.247p.478-79).

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[3] In prior trials, Selvidge gave testimony about her last phone conversation with Gladys that also included referencing her discovery deposition. Selvidge's prior testimony included that she last spoke to Gladys **after 3:00 for 20-25** minutes and that their routine was to watch Oprah at 4:00, not Povich(Ex.242p.519-23;Ex.244p.472-78).

Selvidge testified Barton never pulled her away from Gladys' bedroom(Ex.247p.518). Selvidge testified she never touched Gladys(Ex.247p.519).

Selvidge testified that the night Gladys' body was discovered she told Officer Hodges that she'd knelt by Gladys' body to see if she was alive(Ex.247p.522-23). Selvidge denied that she'd previously reported Barton reached around her to pull her away from Gladys, but then said she was under significant stress, and therefore, might've erroneously told Hodges that(Ex.247p.523,526).

Horton testified she never went in the bedroom(Ex.247p.480). Horton also represented Barton was never close to any bedroom blood or Gladys' body(Ex.247p.482-83). Horton testified when Barton went into Horton's, and immediately before he washed his hands, she didn't see blood on him or in the bathroom(Ex.247p.498).

The night before Gladys was killed, Gladys took away Selvidge's key to Gladys' house(Ex.247p.512). Selvidge wanted both Barton and Horton present when the locksmith unlocked Gladys' door, because they could verify for Gladys that she wasn't breaking in(Ex.247p.513).

Officer Hodges recounted that before the locksmith arrived Barton was pounding on the trailer's end yelling for Gladys(Ex.247p.535). Hodges talked to Barton at the scene and Barton recounted having seen Gladys at 2:00-2:30 and asking her to borrow $20.00(Ex.247p.537-38). Barton told Hodges that Gladys said she wasn't feeling well and would write him a check later(Ex.247p.537-38).

Hodges recounted Barton told Officer Merritt that he'd answered Gladys' phone and said Gladys couldn't talk because she was in the bathroom(Ex.247p.538-39). Hodges took Barton to the station and noticed blood on his shirt(Ex.247p.539). Barton told Hodges he thought he got blood on himself because he slipped in blood when he pulled Selvidge from Gladys' body(Ex.247p.550-51,555-56).

Hodges confirmed Selvidge told him that Barton reached around her and pulled her away from Gladys' body and Horton was present(Ex.247p.542-45,549). Selvidge's statement confirmed Barton's account that he pulled Selvidge away from Gladys' body(Ex.247p.551-52).

Hodges' report didn't contain a statement that Selvidge reported that Barton cautioned her against entering the bedroom(Ex.247p.546). If Selvidge had made such a statement, Hodges would've included it(Ex.247p.546).

Gladys died from multiple stab wounds with significant blood loss(Ex.247p.585-86,600). She had vaginal injuries consistent with sexual assault(Ex.247p.585-86).

There was one hair recovered from each of Gladys' hands and those were capable of DNA testing(Ex.247p.589,593-94). A large amount of material was recovered under Gladys' fingernails(Ex.247p.589-92).

Krista Torrisi was helping her church pick-up trash on October 12, 1991 (three days after Gladys' death) about two blocks from Gladys'(Ex.247p.635-36,641-42,654-55). Torrisi found check #6027 from Gladys' checkbook payable to Barton for $50.00(Ex.247p.639,657,675,685-86).

Barton acknowledged to Officer Merritt that he answered Gladys' phone and said she was in the bathroom when Pickering called about 3:15(Ex.247p.662-66). Merritt indicated Barton told Officer Hodges that he got blood on himself when he pulled Selvidge away from Gladys(Ex.247p.672,683). Merritt recounted Barton had acknowledged being at Horton's to wash his hands and that Horton hadn't reported seeing blood on Barton's hands(Ex.247p.674,686-87). Merritt seized soap and hand towels from Horton's and no blood was found(Ex.247p.687). Barton told Merritt about having asked Gladys that afternoon to borrow money and that she'd asked him to return for a check because she was ill(Ex.247p.674-75,685). Barton told Merritt that he returned and knocked on Gladys' door at about 4:30, but she didn't answer(Ex.247p.675).

Officer Merritt testified that no hairs, blood, fingernail scrapings or semen recovered from Gladys belonged to Barton(Ex.247p.680-81,686-88). Barton's pocket knife and watch were blood free as was a knife recovered from a drainage ditch(Ex.247p.689). Barton had no scratches or scrapes(Ex.247p.681). Barton consented to his truck being searched(Ex.247p.683). Barton gave Rick Ausmus' name as someone he was with and Merritt confirmed Barton was with Ausmus(Ex.247p.685).

Officer Isringhausen interviewed Selvidge(Ex.247p.746). Selvidge told Isringhausen that she started to bend over Gladys' body and Barton pulled her away(Ex.247p.747-48). Selvidge told Isringhausen no one fell in Gladys'

bedroom(Ex.247p.747). Isringhausen was present for the autopsy and Gladys' clothing was blood saturated(Ex.247p.740,758).

Highway Patrolman Lock did fingerprint and handwriting examinations(Ex.247p.763,766). Gladys did all the writing on check #6027(Ex.247p.767,770-71). It was payable to Barton for $50.00 and dated and signed October 9, 1991(Ex.247p.770-71). No identifiable fingerprints were found on check #6027, Gladys' checkbook, or some knives(Ex.247p.689,771-73).

Highway Patrolman Maloney identified blood on Barton's boots and jeans, but couldn't say whose it was(Ex.247p.788). Blood found on Barton's shirt was consistent with Gladys'(Ex.247p.789-92). Fingernail scrapings from Gladys contained blood, but they didn't come from Barton or Bartlett(Ex.247p.793-95). A pocket knife, soap, a wooden club, and other knives were negative for blood(Ex.247p.795-96). A sexual assault kit was negative for semen(Ex.247p.795). Blood found on a pillow case and bedding was still wet when received at the lab on October 17th(Ex.247p.817-18).

Newhouse testified two stains on Barton's jeans and small stains on Barton's shirt were impact spatter, not inadvertent contact transfer(Ex.247p.866-68,885-87,891).

Kessler's Newhouse cross-examination included:

Q. If something on a car might be **paint** or it might be **manure**, you can't say which one it is, only that it is consistent with **paint** or consistent with

manure. Doesn't mean it's one or the other if it's just consistent with one of them; correct?

A. **I wouldn't even attempt to describe that particular circumstance in that way.**

(Ex.247p.907)(emphasis added). When Kessler stated blood spatter analysis is "not a science" Newhouse countered that was "not true"(Ex.247p.908).

Dandurand interrupted Kessler's Newhouse cross-examination stating:

THE COURT: Just a couple of observations I am going to make. First of all, for the last 20 minutes, this has been argument and not cross-examination. It's totally argumentative. You continue to ask this witness and others about experiments that were not done, which is not permissible. Although it has not been objected to, I have allowed it because it has not been objected to. I want to suggest that it is within my discretion that I can tell you when it is time to wrap up this examination, and if you want to ask him about things, that's okay. It's time to stop arguing at this time with the witness. It's argumentative. Ask him questions if you have questions about his testimony. **This is just argument**.

(Ex.247p.911-12)(emphasis added).

On recross, Kessler asked Newhouse whether space programs follow verifiable physics and Newhouse acknowledged they did(Ex.247p.918-19). That was followed by:

Q. Okay. You don't have any of that in this case?

A. I didn't apply any of the principles of NASA.

Q. Or really any principles of **Deputy Dog**?

MR. BRADLEY: Objection, Your Honor.

THE COURT: **Sustained**.

(Ex.247p.919)(emphasis added).

While respondent promised in opening all four snitches would testify(Ex.247p.441-42), only Allen did. Allen testified that while confined in Lawrence County with Barton on "**at least five times"** Barton threatened to kill her like he'd killed an old lady(Ex.247p.931-34)(emphasis added).

4. Defense Case

Highway Patrol chemist Smith testified a hair on Gladys' stomach and one from her bedspread were inconsistent with both Barton and Gladys(Ex.247p.965-69).

Brenda Montiel lived in the trailer park and knew Barton(Ex.247p.970-71). Barton was at Montiel's three times(Ex.247p.971-72). The first time Montiel saw Barton was about 5:30 p.m., she didn't see blood on him, and **he came to her house to ask if she'd seen Gladys because people were looking for Gladys**(Ex.247p.971-72). On the third occasion, Montiel, was preparing dinner and invited Barton to stay and he ate with her for an hour and she didn't see blood(Ex.247p.972-73).

5. Guilt Arguments

Respondent's initial and rebuttal closing arguments focused on its timeline and how it supported guilt(Ex.247p.1017-21,1048-49,1055).

Respondent emphasized in original and rebuttal argument Newhouse had found impact spatter and not inadvertent transfer contact with Selvidge(Ex.247p.1022-24,1048-52).

Kessler argued the timing for when Barton was at Gladys' to commit the offense wasn't established(Ex.247p.1028-29,1033).

Kessler argued blood on Barton's clothes was caused by inadvertent transfer contact with Selvidge, not impact spatter(Ex.247p.1030-34,1036-38,1041). Kessler attacked Newhouse's work as not "even junk science" with findings devoid of "a scientific method"(Ex.247p.1037-39,1043).

D. 29.15 - Arnold

The 29.15 motion included allegations counsel was ineffective for failing to present evidence that would've supported the motion to dismiss/preclude death based on prosecutorial misconduct(29.15L.F.96-97). In particular, evidence of law enforcement's handling of Arnold throughout(29.15L.F.96-97). The evidence that would've been uncovered when Arnold wrote counsel about knowing "crooked stuff in the handling of witness[es]" included Arnold getting conjugal jail visits for testifying against Barton(29.15L.F.107-08).

1. Arnold's 29.15 Testimony

When Arnold sent his Kessler letter, he was serving a sentence arising out of a **2005 Camden County** kidnapping, armed criminal action, and attempted escape case for which he was serving life plus 280 years(Ex.208p.28-29). Arnold's priors were for a **1992 Christian County** second degree murder and burglary for which he was

sentenced to fifteen years and that he was seeking to get paroled on when he was deal making with Ahsens to testify against Barton(Ex.208p.29-30).

Arnold's letter stated:

> If you are Walter Barton's attorney you may want to talk with me. I have some information that would help you on your defense. Some crooked stuff in the handling of witness ext [sic].

(Ex.207).

Kessler never contacted Arnold prior to the fifth Cass County trial(Ex.208p.9). Arnold testified the "crooked stuff" was prosecutors' making arrangements so he could have sex with his girlfriend, Brandy, in Christian County Jail's breathalyzer room and Christian County Prosecutor's Office in exchange for testifying against Barton(Ex.208p.11-12). Ahsens arranged to place Arnold and Brandy in those rooms with the door shut for extended periods(Ex.208p.21-22). Exhibits 1-206, with a few exceptions, are letters Arnold wrote to Brandy, and chronicled Ahsens' and his investigator Quick's arranging their sexual visits(Ex.208p.14-15,50).[4] The letter writing commenced in April, 1993, and ended in September, 2001(*See* Exs.1-206).

Part of Arnold's deal with Ahsens was Ahsens would write a favorable parole board letter(Ex.208p.18-19). Ahsens also expressly agreed in exchange for Arnold's

[4] Exhibits 1-206 all are connected to Ahsens' trading sex for testimony. Arnold's letters are replete with painstakingly explicit, graphic descriptions of Arnold's sexual attraction for Brandy and Exhibit 158Ap.33-45 is representative.

testimony he'd make arrangements so Arnold could have sex with his girlfriend, Brandy(Ex.208p.18-21). Ahsens' intermediary in negotiating these visits was his investigator, Curtis Quick(Ex.208p.18-21). Ahsens and Quick communicated with both Arnold and Brandy about the details of arranging their sexual visits(Ex.208p.21).

Arnold's May 25, 1993, letter (postmarked 5/27/93 return address Farmington Correctional) to Brandy, included his desire to be with her in October, 1993, because in Arnold's negotiations he "was told if I go through with the deal we will be left alone for a long time" so they could have sex(Ex.17p.11;Ex.208p.18-21). Arnold was "specifically" told in exchange for testifying against Barton he'd get the opportunity to have sex with Brandy(Ex.208p.20;Ex.17p.11). Arnold's May 25, 1993, letter graphically described how sexually satisfied Brandy would be(Ex.208p.18-21;Ex.17p.11).

Exhibit 62, was an August 28, 1993, letter from Arnold to Brandy (postmarked 8/30/93 return address Christian County Jail)(Ex.208p.22-24). Exhibit 63 was an August 31, 1993, letter from Arnold to Brandy (postmarked 9/1/93 return address Farmington Correctional) when he was returned from Christian County(Ex.208p.22-24). Arnold indicated the two letters reflected they had sex in the breathalyzer room(Ex.208p.22-24). Arnold indicated his reference to being unable to wait until October, 1993 in Exhibit 17 at 11, *supra*, described the agreed arrangements for sexual visits as referenced in Exhibits 62 and 63(Ex.208p.24).

All of Arnold's and Brandy's sexual encounters occurred when he was in Christian County(Ex.208p.25-26). Arnold's December 6, 1993, letter (postmarked

12/7/93) reflected they had sex and Arnold looked forward to more stating: "I know it's going to be so great to make love with you. I know we've been intimate before, but not to where we could relax and let loose. Baby, it feels so good inside you. You just don't realize what you've done to me."(Ex.208p.25;Ex.81p.1).

Exhibit 98 was a letter dated January 12, 1994, from Arnold to Brandy describing how he'd make her feel sexually satisfied when he saw her in Ozark(Ex.98p.5).

On February 18, 1994, Arnold sent Brandy a letter (postmarked 2/22/94) stating: "when we made love the first time it was like never before to me."(Ex.122p.2).

Exhibit 130 was a letter dated March 1, 1994 (postmarked 3/2/94) Arnold sent from Farmington(Ex.208p.26-27). Arnold's statements included:

I miss you so much, baby. I can't wait to hold you in April. I miss your tenderness so much. You always made me feel so good on our visits, baby.

(Ex.208p.26-27). Those statements reflected Arnold's anticipating being with Brandy in April, 1994(Ex.208p.27).

On March 3, 1994, Quick wrote Brandy and enclosed Ahsens' parole board letter(Ex.131). Quick's letter included: "We will try to be present at the hearing, but there is a trial scheduled for the week of March 21, 1994."(Ex.131). Ahsens' parole board letter stated the "only" consideration Arnold had sought was Ahsens' letter(Ex.131).

Arnold wrote Brandy on April 7, 1994 (postmarked 4/8/94), describing what he planned to do as part of "some loving" when he saw her and he was going to "make [her] feel sooo good."(Ex.143p.1-2). Arnold added that when Brandy received his letter he expected to have already been alone with her(Ex.143p.2).

Exhibit 146 was a letter postmarked April 25, 1994, Arnold sent from Farmington(Ex.208p.27). It included:

> I got a toy for ya! So have I told you how good you made me feel in Ozark. I really liked it. I really liked it in **Tim's office downstairs**. I like going slow. Made me come so fast, though. You're yummy. I can't wait to really make love to you. I can't ever take the time down there to make you feel really good. I'm - I'll make up for the way you make me feel. Okay, baby. I love you.

(Ex.208p.27-28;Ex.146p.5-6)(emphasis added). Arnold said "Tim" was Christian County Prosecutor Tim McCormick, and that he and Brandy had sex in McCormick's office and both Ahsens and McCormick knew it was happening(Ex.208p.28). Arnold and Brandy had sex a total of four or five times while he was held in Christian County, arranged through Ahsens and McCormick(Ex.208p.44).

Exhibit 158A is 77 pages of "letters" from Arnold to Brandy that begins on "Mon May 16th" and ends "Mon 6th" and postmarked June, 1994(Ex.158Ap.1,9,35,77). In this "letter" Arnold noted that he wouldn't be getting paroled as soon as hoped, so they wouldn't "be getting to have are [sic] little roll's [sic] in the county jail," and won't get to be "intament" [sic] until he got

paroled(Ex.158Ap.1-2). Arnold discussed how they "romped in the prosucter's [sic] office"(Ex.158Ap.2). Arnold referenced the "first time we had sex" as happening in Ozark(Ex.158Ap.51-52).

Exhibit 176A is Arnold's letter to Brandy postmarked November 8, 1994. Arnold lamented their relationship's unraveling because they no longer had the opportunity for sex(Ex.176Ap.6). Arnold commented: "I should have never did what I did in Ozark…."(Ex.176Ap.6). Arnold added once they were "good friends as well as lovers"(Ex.176Ap.6-7).

Exhibit 181 is a letter from Arnold to Brandy dated "Dec 15th" (postmarked 12/16/94). Arnold reminisced about the first time they were in court together and Brandy came there "wearing hot pink shorts looking all sexy" and "**McCormik** [sic] **went to McDonald's for** [him]"(Ex.181p.3)(emphasis added).

Exhibit 192 is a letter from Arnold to Brandy dated September 23, 1995, (postmarked 9/25/95), where Arnold referred to Brandy as having been his "lover" and that he remembered the times they were alone in Ozark(Ex.192 p.2). Arnold continued that he wished he "could have made love to [her] to [her] sexual gratifcation [sic]"(Ex.192p.2-3).

Exhibit 197 is a letter from Arnold to Brandy sent from Missouri Eastern Correctional (Pacific) dated February 7, 1997 (postmarked 2/10/97). Arnold wrote that Pacific's visiting area was the best of all except for Ozark and he "thought [she] might remember! ☺ Fun, Fun. [G]ood too! ☺"(Ex.197p.3(Arnold numbered as 2)).

Arnold testified he wrote Kessler to alert him about Ahsens' and McCormick's having arranged his sex with Brandy and that he lied in prior testimony because **Barton never admitted killing Gladys**(Ex.208p.36,46-47,53).

2. Brandy's 29.15 Testimony

Initially, Brandy balked at testifying and 29.15 counsel got an order for her Arkansas deposition(29.15L.F.663-68;29.15Tr.44-45). Ultimately, Brandy testified in-court.

In 1993, Brandy Letterman (Crawford) lived in Mountain Home, Arkansas(29.15Tr.341). Brandy met Arnold when he was confined in Taney County, when she was visiting another inmate(29.15Tr.342-43). They began writing and phoning(29.15Tr.342-43). Because she and Arnold planned to marry, while he was in prison, she changed her legal name to Arnold in 1993 or 1994(29.15Tr.341,344-47). They never married because they broke-up(29.15Tr.347).

Brandy kept Arnold's letters and provided them to 29.15 counsel(29.15Tr.343-45). Brandy kept them as long as she did because they were part of her life and memories, they were like pictures of one's children which wouldn't be discarded(29.15Tr.343-45).

Ahsens called Brandy to enlist her to persuade Arnold to testify against Barton(29.15Tr.347-50). Arnold called and directed Brandy to communicate with Ahsens and Quick and she did(29.15Tr.350,362). Brandy discussed with both Ahsens and Quick Arnold's testifying against Barton, which was conditioned on them

arranging for she and Arnold to have "special visits" with "alone time" so they could have sex in Christian County(29.15Tr.348-49,364-65,368,374,378-79,383).

Ozark Police Chief, Steve Marler, wrote Arnold a parole board letter(Ex.131). Marler told Brandy other inmates didn't get to have special, unsupervised, multi-hours, alone visits like she and Arnold got(29.15Tr.356-58,377-78). Unlike other inmates with visitors, Arnold and Brandy got "lax" supervision, not constant watching, with jailers checking on them occasionally while alone in a room(29.15Tr.356-57)

Exhibit 83 was a letter Arnold wrote Brandy dated December 8, 1993 (postmarked 12/16/93), where he directed her "tell Curtis and Bob that same deal as last time Ozark or no deal, and we want all our visits in the breathalizer [sic] room."(29.15Tr.362;Ex.83p.11-12).

Brandy testified that Exhibit 146 (*supra*) referenced she and Arnold having had sex in Christian County P.A. Tim McCormick's office(29.15Tr.363-64). She and Arnold had sex multiple times at the Christian County Courthouse/Jail, including sex in Prosecutor McCormick's Office(29.15Tr.372-76). The occasion when they had sex in McCormick's Office, in a chair, she saw Ahsens and Quick in McCormick's office who left so they could have sex there(29.15Tr.374-75).

Brandy testified the understanding was that in exchange for Arnold testifying against Barton, Ahsens would write a parole board letter and she and Arnold would get special, alone visits where they could have sex(29.15Tr.364-65,374). Arnold was trying to get paroled so they'd be together(29.15Tr.365). She personally negotiated

the special alone visits with both Ahsens and Quick and that Arnold's testifying against Barton was conditioned on getting those visits(29.15Tr.378-79). Brandy arranged the special alone visits with the A.G.'s Office they got so that they avoided having jail guards sitting next to them staring(29.15Tr.378).

All their sexual encounters happened at Christian County's Jail and once in the Christian County Prosecutor's office and never in Corrections(29.15Tr.359). Exhibits 62 and 63 (*supra*) reflected Arnold and Brandy had sex in Christian County(29.15Tr.382-83).

E. 29.15 *Brady* and Ineffectiveness

1. Selvidge's Undisclosed Priors

The 29.15 motion alleged respondent failed to disclose Selvidge's prior convictions to impeach her(29.15L.F.84-85,131-36). The 29.15 evidence showed Selvidge pled guilty in June, 2002, to assaulting Billie Harrel(Ex.248). In May, 2003, Selvidge pled guilty to violating a protective order prohibiting Selvidge from communicating with Harrel when Selvidge called Harrel to say she was then having sex with Harrel's boyfriend and Selvidge hung-up(Ex.249). A.A.G. Bradley testified Selvidge was "a crucial witness"(29.15L.F.763). While the claim was rejected, the findings stated: "Ms. Selvidge's credibility [was] important"(29.15L.F.1004-06).

2. Horton Undisclosed Interview Notes

The 29.15 motion alleged respondent failed to disclose a Horton interview memo that contained evidence supporting Gladys was alive outside respondent's 3:00-4:00 timeframe when Barton's whereabouts were substantially accounted

for(29.15L.F.90,156-57). That memo reflected when Horton went to check on Gladys at 4:15 a radio was playing and when Horton returned at 5:30-5:40 none was playing(Ex.253).

3. Failure to Present Spatter Evidence

The 29.15 alleged counsel was ineffective for failing to present evidence that blood on Barton's shirt wasn't high velocity spatter arising from Barton inflicting wounds on Gladys as Newhouse claimed(29.15L.F.109-10). Stuart James, a blood spatter expert, identified spots on Barton's shirt as caused by transfer contact, not high velocity blood spatter(29.15Tr.220-21). James concluded the presence of the few blood stains on Barton's shirt didn't support they were impact spatter because the quantity didn't constitute a spatter pattern and could've been deposited by other than high velocity spatter(29.15Tr.228-29,232-33,257-58). Newhouse's opinions were incorrect to a reasonable degree of scientific certainty under blood spatter experts' standards(29.15Tr.258-59). James indicated the blood stains on Barton's clothing could be explainable as blood transfer if Selvidge had contact with wet blood(Ex.229p.5).

All claims were denied after a hearing.

POINTS RELIED ON

I.

AHSENS TRADED SEX FOR TESTIMONY

The motion court clearly erred denying counsel was ineffective for failing to investigate Arnold's "crooked stuff" letter because Walter Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel who knew fourth trial defense witness inmate Rentschler had testified Arnold admitted having lied that Barton admitted killing Gladys and who received Arnold's "crooked stuff" letter would have interviewed Arnold and learned Ahsens arranged and concealed "special visits" with "alone time" for sexual relations opportunities between Arnold with Brandy in exchange for Arnold's testimony. Barton was prejudiced because such outrageous conscience shocking behavior violates fundamental principles of justice and had counsel presented this information to Judge Dandurand he would have prohibited death or dismissed.

Childress v. State,778S.W.2d3(Mo.App.,E.D.1989);

Commonwealth v. Chon,983A.2d784(Pa.Superior Ct.2009);

State v. Lenkart,262P.3d1(Utah2011);

U.S. Const. Amends. VI, VIII, XIV.

II.

SELVIDGE'S CALL - THEN HAVING SEX WITH HARREL'S BOYFRIEND

The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03 by not disclosing Debbie Selvidge's two interrelated priors involving same victim, Billie Harrel, with one involving Selvidge's violating a protective order for calling Harrel to say she was then having sex with Harrel's boyfriend, because Barton was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that Selvidge was "a crucial witness" whose "credibility [was] important" because her testimony repudiated Barton having inadvertent blood transfer and respondent relied on statements she attributed to Barton as admissions, but Selvidge's undisclosed priors with the Harrel call would have significantly cast doubt on Selvidge's credibility.

Brady v. Maryland,373U.S.83(1963);

State ex rel. Woodworth v. Denney,396S.W.3d330(Mo.banc2013);

Chism v. Cowan,425S.W.2d942(Mo.1967);

Black v. State,151S.W.3d49(Mo.banc2004);

U.S. Const. Amends. VIII, and XIV;

Rule 25.03(A)(7).

III.

***BRADY* VIOLATION - HORTON NOTES**

The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03, by withholding Carol Horton's statements from prosecution interview notes because Barton was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV in that the Horton notes showed a radio was playing in Gladys' trailer when Horton checked on her at 4:15, but when Horton returned at 5:30-5:40, none was playing; the notes could have been used to refresh Horton's recollection or impeach her testimony she heard nothing at 4:15, and also to prove there was no radio playing at 5:30-5:40 because these events establish either Gladys or the true perpetrator turned her radio off between 4:15 and 5:30-5:40, and thus, Gladys was alive outside respondent's 3:00-4:00 timeframe and Barton did not kill Gladys.

Brady v. Maryland,373U.S.83(1963);

State ex rel. Woodworth v. Denney,396S.W.3d330(Mo.banc2013);

Buchli v. State,242S.W.3d449(Mo.App.,W.D.2007);

U.S. Const. Amends. VIII and XIV;

Rule 25.03(A)(1).

IV.

FAILURE TO IMPEACH SELVIDGE - TIMING

LAST CONVERSATION WITH GLADYS

The motion court clearly erred denying counsel was ineffective for failing to cross-examine Selvidge with her prior testimony on when she last spoke to Gladys and for how long denying Barton effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have cross-examined her on those matters because respondent's case centered on its 3:00-4:00 timeline and highlighting Selvidge's prior inconsistencies regarding the timing and length of her last conversation with Gladys would have cast substantial doubt on respondent's timeline and Barton was prejudiced as the jury would not have convicted him.

Black v. State,151S.W.3d49(Mo.banc2004);

U.S. Const. Amends. VI, VIII, XIV.

V.

FAILURE TO CALL HAMPTON

The motion court clearly erred denying counsel was ineffective for failing to call Michelle Hampton to testify she saw Barton repairing Horton's deck between 4:00-4:20 because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Hampton to testify about seeing Barton at 4:00-4:20 and Barton was prejudiced as Hampton's testimony called into question respondent's 3:00-4:00 crime theory timeline such that the jury would have acquitted Barton.

Foster v. State,502S.W.2d436(Mo.App.,St.L.D.1973);

U.S. Const. Amends. VI, VIII, XIV.

VI.

NO BLOOD SPATTER EXPERT

The motion court clearly erred denying counsel was ineffective for failing to call a blood spatter expert, like Stuart James, because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel knowing they had to explain Barton got Gladys' blood on him through transfer contact and that Newhouse testified at the fourth trial Barton's clothes had high velocity blood spatter would have conducted a thorough investigation and presented a spatter expert to explain Newhouse was wrong and not conducted a cross-examination Judge Dandurand shut down on his own motion as inappropriate and wasting time. Barton was prejudiced because the jury never heard why Newhouse was wrong and blood on Barton's clothing was transfer.

State v. Sandles,740S.W.2d169(Mo.banc1987);

Hutchison v. State,150S.W.3d292(Mo.banc2004);

Tisius v. State,183S.W.3d207(Mo.banc2006);

U.S. Const. Amends. VI, VIII, XIV.

VII.

FAILURE TO IMPEACH HORTON - BARTON'S HANDWASHING/BROKEN DOWN CAR AND DEMEANOR

The motion court clearly erred denying counsel was ineffective for failing to cross-examine Horton about prior inconsistent statements about how long Barton washed his hands, prior knowledge of Barton's car problems, and whether Barton displayed changed demeanor from earlier and the hand-washing time because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have questioned Horton about her prior inconsistent statements and Barton was prejudiced because respondent relied on Barton taking a long time to hand-wash as evidence he was removing blood, which could be attributed to him working on his car, and an alleged altered demeanor as evidence of guilt and Horton's inconsistencies would have cast significant doubt on respondent's version of events.

Black v. State,151S.W.3d49(Mo.banc2004);

U.S. Const. Amends. VI, VIII, XIV.

VIII.

ARGUMENT CONTRADICTING WHAT SELVIDGE TOLD OFFICER ISRINGHAUSEN

The motion court clearly erred denying counsel was ineffective for failing to object to Bradley's guilt closing argument that Selvidge told Officer Isringhausen Barton did not pull her away from Gladys and Gladys' bedroom which expressly contradicted Isringhausen's direct testimony because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to this misrepresentation and Barton was prejudiced because Barton's defense was built around establishing the small amount of blood on his clothing was transfer from Barton pulling Selvidge away and Bradley's argument repudiated that explanation.

State v. Storey,901S.W.2d886(Mo.banc1995);

U.S. Const. Amends. VI, VIII, XIV.

IX.

FAILURE TO CALL DR. MERIKANGAS

The motion court clearly erred denying counsel was ineffective for failing to present evidence from Dr. Merikangas Barton has significant congenital and trauma-based brain damage adversely impacting his intellectual abilities and predisposing him to violent impulsive acts because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Merikangas as maintaining residual doubt and presenting brain damage evidence were compatible and Barton was prejudiced because there is a reasonable probability had the jury heard Merikangas it would have voted life.

Hutchison v. State,150S.W.3d292(Mo.banc2004);

Ervin v. State,80S.W.3d817(Mo.banc2002);

U.S. Const. Amends. VI, VIII, XIV.

X.

MITIGATING WITNESSES - FAMILY

The motion court clearly erred denying counsel was ineffective for failing to present mitigating evidence available from Walter Barton's family members Juanita Branan, Marie Johnson, Joyce Rogers, Robert Barton, Mary Reese, and Ralph Barton Jr. because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have adduced through them evidence of the dysfunctional, abusive home in which Barton was raised and how Barton's behavior became impulsive following his skull fracture for consideration with Dr. Merikangas' findings (Point IX), and Barton was prejudiced because had the jury heard this evidence it would have voted life.

Wiggins v. Smith,539U.S.510(2003);

Hutchison v. State,150S.W.3d292(Mo.banc2004);

U.S. Const. Amends. VI, VIII, XIV.

XI.

RAMBLING INCOHERENT NON-DEFENSE PENALTY CLOSING ARGUMENT

The motion court clearly erred denying counsel was ineffective in making a rambling, incoherent penalty argument advocating a prohibited jury nullification non-defense, capital punishment's "moral repugnancy" and "begging" for Barton's life, expressly contradicting counsel's professed opposition to mitigation "begging" for Barton's life (Point X), because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have argued Barton's mitigating, redeeming qualities warranting life, and not have argued imposing death would lower the jurors to the level of "the Walter Bartons of the world." Barton was prejudiced because had the jury been given evidence-based reasons it would have voted life.

State v. Hunter,586S.W.2d345(Mo.banc1979);

Kubat v. Thieret,867F.2d351(7thCir.1989);

U.S. Const. Amends. VI, VIII, XIV.

XII.

RESPONDENT'S FAILURE TO DELIVER ON OPENING STATEMENT ASSERTIONS

The motion court clearly erred denying counsel was ineffective in failing to request a mistrial at the close of all respondent's guilt evidence because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have requested a mistrial because in opening statement the jury heard four snitches would testify Barton admitted killing Gladys and one who would testify, but did not, that Barton said he licked her blood and liked its taste when the jury heard from only one, Allen, who Judge Sims previously found lied, testify Barton admitted killing Gladys. Barton was prejudiced as such outside the evidence representations caused the jury to convict and vote death.

State v. Storey,901S.W.2d886(Mo.banc1995);

Peterson v. State,149S.W.3d583(Mo.App.,W.D.2004);

U.S. Const. Amends. VI, VIII, XIV.

XIII.

REPEATED PROSECUTORIAL MISCONDUCT/NEGLIGENCE

The motion court clearly erred denying the claim death against Barton should be prohibited because Barton was denied due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Barton's death sentence is premised on events from 1991 and the cause of respondent repeatedly seeking death against Barton and him being under a death sentence so long is respondent's repeated deliberate misconduct and sometimes negligence.

Lackey v. Texas,514U.S.1045,115S.Ct.1421(1995);

U.S. Const. Amends. VIII, XIV.

APPLICABLE STANDARDS

Throughout there are repeating standards governing review here. To avoid unnecessary repetition, those aren't repeated throughout.

Appellate Review

Review is for whether the 29.15 court clearly erred. *Barry v.State*,850S.W.2d348,350(Mo.banc1993).

Ineffectiveness

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would've exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant is prejudiced if there's reasonable probability but for counsel's errors the result would've been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.*426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994);*Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

Eighth and Fourteenth Amendment

The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

ARGUMENT

I.

AHSENS TRADED SEX FOR TESTIMONY

The motion court clearly erred denying counsel was ineffective for failing to investigate Arnold's "crooked stuff" letter because Walter Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel who knew fourth trial defense witness inmate Rentschler had testified Arnold admitted having lied that Barton admitted killing Gladys and who received Arnold's "crooked stuff" letter would have interviewed Arnold and learned Ahsens arranged and concealed "special visits" with "alone time" for sexual relations opportunities between Arnold with Brandy in exchange for Arnold's testimony. Barton was prejudiced because such outrageous conscience shocking behavior violates fundamental principles of justice and had counsel presented this information to Judge Dandurand he would have prohibited death or dismissed.

Given this case's history reasonable counsel who received Arnold's "crooked stuff" letter would've investigated with Arnold what the "crooked stuff" was. Reasonable counsel would've learned Ahsens had arranged "special visits" with "alone time" for Arnold and Brandy to have opportunities for sexual relations in exchange for Arnold's testimony. Barton was prejudiced because there's a reasonable

probability had Judge Dandurand known this information he would've precluded death or dismissed.

Review Standards

Review is for clear error. *Barry v. State*,850S.W.2d 348,350(Mo.banc1993). The Eighth Amendment and Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would've exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant is prejudiced if there's a reasonable probability that but for counsel's errors the result would've been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002)(discussing *Strickland*). A reasonable probability is probability sufficient to undermine confidence in the outcome. *Id.*426.

Ahsens' History - Not Playing By The Rules

Ahsens has a history of misconduct in Barton's and other capital cases. Death sentences were set aside in *Taylor v. State*,262S.W.3d231(Mo.banc2008) and *Tisius v. State*,183S.W.3d207(Mo.banc2006) because Ahsens withheld evidence.[5]

[5] Judicial notice of the *Tisius v. State*, SC86534 Findings at Legal File 467-495 is requested. While respondent didn't appeal, Tisius appealed guilt relief denial.

It was Ahsens' failure to endorse witnesses that caused Barton's first trial mistrial. *State v. Barton*,936S.W.2d781,782(Mo.banc1996).

Following the second trial hung jury, Ahsens wrote juror Smalley with a Camden County booking picture of Barton and Barton's priors attached(Ex.251;29.15Tr.563-64). Ahsens wrote: "Mr. Smalley - I thought you might like to share this information with your holdouts. It is the evidence you would have seen in Phase II. Bob Ahsens (314) 751-9186."(Ex.251).

The third trial was reversed because of Ahsens' improper objection to counsel's argument challenging respondent's timeline. *Barton*,936S.W.2d at 782-85.

Judge Sims in the 29.15 vacated Barton's fourth trial conviction because Ahsens failed to disclose snitch witness Allen's criminal history and **found he didn't believe Ahsens' testimony**(Ex.224p.97-100). During the 29.15, a letter surfaced from Cass County A.P.A. Cole to Ahsens reciting that Allen's Cass County forgery case was dismissed in exchange for her Barton testimony(Ex.224p.100). Judge Sims found Ahsens failed to disclose that dismissal(Ex.224p.100). Sims found: "[b]ecause of the letter from Candace Cole to Mr. Ahsens, it is clear that Mr. Ahsens was aware, prior to trial, that Ms. Allen had received consideration for her testimony."(Ex.224p.100-01).

Sims found Allen's Indiana charges attorney was informed by Ahsens' investigator, Dresselhaus, that if Allen agreed to testify, her Missouri charges would be dismissed(Ex.224p.100). Sims noted Allen's Indiana attorney's testimony was

uncontroverted and Sims inferred if Dresselhaus were called he would've testified similarly(Ex.224p.100).

Sims found Ahsens failed to correct the perjurious false impression Allen created about her criminal convictions with incomplete testimony(Ex.224p.102-03).

Like *Tisius*, *supra*, respondent didn't appeal Judge Sims' decision.

Arnold's Kessler Letter

Arnold sent a letter to Kessler's office dated "1/28" (postmarked 1/30/06), stating:

> If you are Walter Barton's attorney you may want to talk with me. I have some information that would help you on your defense. Some crooked stuff in the handling of witness ext [sic].

(Ex.207).

Motion To Preclude Death/Dismiss

On January 31, 2006, counsel moved to dismiss or prohibit death(Ex.224p.77-124,127-32;Ex.247p.1-26,42;Ex.247 at Index 3). On February 3, 2006, Dandurand took-up the motion for the first time(Ex.247p.1-26). The relief requested was premised on Ahsens' repeated misconduct here(Ex.224p.80; Ex.247p.1-26).

Dandurand was giving the motion "serious consideration," and "looking at this pretty strongly"(Ex.247p.17,21). Respondent's failure to appeal Sims' decision was "an important fact" in considering the motion to dismiss/preclude death(Ex.247p.21). Dandurand added if the relief sought was appropriate under law, then he was "darn sure going to consider it based upon the history of this case"(Ex.247p.23-24).

Dandurand was "serious" about considering prohibiting respondent seeking death because of the prejudice to Barton, but disinclined to dismiss(Ex.247p.26-27).

On the first day of trial, March 6, 2006, Dandurand revisited the motion(Ex.247p.42-43). Dandurand found Barton was prejudiced "by having to come back over and over again" because respondent's case kept improving, adding snitches(Ex.247p.45). Dandurand noted: "[t]he only time the jury got to hear a fair crack" it hung(Ex.247p.45). Dandurand added: "So it is almost unarguably that the Defendant has been prejudiced. The Defendant has been prejudiced."(Ex.247p.45). Dandurand left ruling in abeyance adding if forced to rule, he'd prohibit death(Ex.247p.45-46).

During the same March 6, 2006, pretrial hearing, Kessler informed Dandurand he'd received Arnold's letter(Ex.247p.46-47). Arnold's letter urged defense counsel speak with him(Ex.247p.46-47). Kessler didn't keep it, but instead gave it to Christian County P.A. Cleek(Ex.247p.46-47). Kessler told Judge Dandurand A.A.G. Bradley had indicated the A.G.'s Office would talk to Arnold about his letter(Ex.247p.46). Kessler informed Dandurand he needed to know what respondent learned(Ex.247p.46). Bradley stated the A.G.'s Office never spoke to Arnold because it "got busy"(Ex.247p.46).

Kessler noted at the fourth trial Arnold was declared unavailable because he invoked the Fifth and his prior testimony was read(Ex.247p.50). Dandurand noted Arnold wasn't wanting to take the Fifth, but wanted to talk to Barton's counsel(Ex.247p.49).

Arnold's Testifying/Not Testifying History

Arnold testified at the Christian County second trial on October 26, 1993(Ex.241 at Index and 1,322). Arnold testified he'd been convicted of second degree murder and burglary(Ex.241p.322). Arnold hoped Ahsens' writing the parole board helped(Ex.241p.335).

Arnold testified at the third trial in Christian County on April 12, 1994(Ex.242p.410-11,778;Ex.242 Index at pgs.F-G). Arnold recounted he was serving 15 years for second degree murder(Ex.242p.779-80,790).

Arnold was called outside the jury's presence at the Benton County fourth trial in April, 1998, and refused to testify(Ex.244p.41,688-89). Arnold's third trial testimony was then read(Ex.244p.727-53 reading from Ex.242p.778-802).

At the Cass County fifth trial in March, 2006, A.A.G. Bradley told the jury in opening Arnold would testify Barton admitted "he killed an old lady by cutting her throat, stabbing her, cutting an X on her"(Ex.247p.441). Arnold testified, outside the jury's presence, that if called he'd invoke the Fifth(Ex.247p.723). Arnold admitted he lied and committed perjury about Barton having admitted killing Gladys(Ex.247p.719-20).

Counsels' Testimony

Kessler didn't know how he could've used the sex information(29.15Tr.437-38). Bruns authored the motion to dismiss/preclude death(Ex.224p.77-124;29.15Tr.437). Kessler and Bruns didn't talk to Arnold about his letter and what Arnold meant by "crooked stuff"(29.15Tr.437-42,514-15;Ex.207). Bruns would've

wanted to know about the deal for "special visits" with "alone time" for sex to support the motion to dismiss/preclude death and because respondent was required to disclose such deals(29.15Tr.514-17).

Findings

Counsel was not ineffective; Brandy and Arnold aren't credible(29.15L.F.987,997,1006,1023-24).

Brandy didn't explain keeping Arnold's letters twenty years(29.15L.F.995). Brandy's testimony she planned to marry Arnold and willingness to wait for Arnold's release wasn't credible because Arnold was serving life plus 280 years(29.15L.F.995-96).

Brandy contradicted Arnold(29.15L.F.997). Brandy testified that hers and Arnold's request wasn't to be allowed to have sex, but to have the respect of not being stared at during visits(29.15L.F.997). Brandy contradicted Arnold's claims of having sex four times by saying they "had sex quite a few times"(29.15L.F.987,997,1023-24).

Even if Brandy and Arnold had sex, it wasn't pursuant to any agreement with respondent(29.15L.F.997,1023). Barton wasn't prejudiced because Arnold didn't testify(29.15L.F.997).

Arnold's and Brandy's 29.15 Testimony

Arnold testified that Ahsens expressly agreed that in exchange for Arnold's testimony he would arrange so Arnold could have sex with Brandy(Ex.208p.18-21;Ex.17p.11). Arnold's May 25, 1993, letter (postmarked 5/27/93 return address

Farmington) to Brandy included that he couldn't wait to be with her in October, 1993, because in Arnold's negotiations he "was told if I go through with the deal we will be left alone for a long time" so they could have sex(Ex.17p.11;Ex.208p.18-21). Arnold was "specifically" told that in exchange for testifying against Barton he'd get the opportunity to have sex with Brandy(Ex.208p.20;Ex.17p.11).

Ahsens' intermediary negotiator was investigator Quick(Ex.208p.18-21). Ahsens and Quick communicated with both Arnold and Brandy about arranging their visits(Ex.208p.21). Ahsens arranged so Arnold was placed with Brandy either in the breathalyzer room at the Christian County Jail or a room in the Christian County P.A.'s Office(Ex.208p.21-22). Arnold testified his August 28, 1993 (Ex.62) and August 31, 1993 (Ex.63) letters considered together reflected they had sex in the breathalyzer room(Ex.208p.22-24)

Arnold testified that his April 25, 1994, letter (Ex.146) describing their sexual experience, references it as having occurred in "Tim's office," meaning they had sex in Christian County P.A. Tim McCormick's office(Ex.208p.28). Ahsens and McCormick knew they were having sex in McCormick's office(Ex.208p.28). Arnold recounted he and Brandy had sex four or five times while he was held in Christian County and arranged through Ahsens and McCormick(Ex.208p.44).

Brandy testified she had discussions with both Ahsens and Quick about Arnold testifying against Barton which was conditioned on them arranging so she and Arnold could have "special visits" with "alone time" to have sex in Christian County(29.15Tr.348-49,364-65,368,374,378-79,383). Brandy testified Exhibit 146's

discussion of having had sex "in Tim's office" referred to she and Arnold having had sex in Christian County P.A. Tim McCormick's office(29.15Tr.363-64). Brandy testified she and Arnold had sex multiple times at the Christian County Courthouse/Jail including in P.A. McCormick's Office(29.15Tr.372-76).

Counsel Was Ineffective

Counsel's duty to investigate includes contacting potential witnesses who might aid the defense. *Childress v. State*,778S.W.2d3,6(Mo.App.,E.D.1989). Failing to investigate because counsel doesn't think it would help doesn't constitute reasonable strategy, but instead is abdicating advocacy. *State v. Lenkart*,262P.3d1,8(Utah2011).

During the fourth trial defense guilt case, Pacific inmate law clerk, Rentschler, testified Arnold told Rentschler he didn't want to testify again against Barton because he had lied and wanted refusing to testify advice(Ex.244p.781-87).

Arnold sent his "crooked stuff" letter to Kessler before the fifth trial. During fifth trial questioning outside the jury's presence, Arnold admitted he lied about Barton having admitted killing Gladys(Ex.247p.719).

Reasonable counsel who knew Rentschler testified at the fourth trial that Arnold had admitted lying about reporting Barton had admitted having killed Gladys and who'd received Arnold's "crooked stuff" letter, would've talked to Arnold about what the "crooked stuff" was. *See Strickland and Childress.* Judge Dandurand recognized counsel's duty to investigate Arnold when he stated Arnold wasn't wanting to take the Fifth, but rather wanted to talk to counsel(Ex.247p.49). Instead,

Kessler gave the original letter to P.A. Cleek and relied on A.A.G. Bradley to investigate Arnold, which Bradley didn't do because he "got busy"(Ex.247p.46-47). Kessler abdicated his responsibility to advocate for Barton in the worst kind of way - he relied on his adversary to "investigate" Arnold. *See Lenkart.*

In *Commonwealth v. Chon*,983A.2d784,785(Pa.Superior Ct.2009), the trial court granted the defendant's motion to dismiss soliciting prostitution and prostitution charges due to outrageous government conduct. In *Chon*, a prostitution investigation of a spa was commenced after a patron complained to police he was solicited to engage in sexual acts for money, but declined. *Id.*785. The police then enlisted that patron and furnished him money to pay to actually engage in assorted sexual acts, including intercourse, and to compensate him for his time on four separate visits. *Id.*785-86. The dismissal for outrageous police conduct was affirmed because it "was so grossly shocking and so outrageous as to violate the universal sense of justice" underlying the due process clause. *Id.*787. The *Chon* Court observed: "a strong presumption should exist against trading in the currency of intimate relations." *Id.*790.

Barton was prejudiced because had Dandurand heard the 29.15 evidence available from Arnold, that Ahsens had arranged so the sexual rendezvouses could happen by providing "special visits" with "alone time," as verified through **Arnold's letters to Brandy authored contemporaneously with the sexual rendezvouses**, then there is a reasonable probability Dandurand would've precluded death or dismissed. When counsel's motion was presented to Dandurand, he indicated he was

giving it "serious consideration," "looking at this pretty strongly," "darn sure going to consider it based upon the history of this case," and "serious" about considering prohibiting death(Ex.247p.17,21,23-24,26-27). Dandurand found Ahsens' prior conduct had "prejudiced" Barton(Ex.247p.45).

Ahsens' conduct of arranging "special visits" with "alone time" for sexual rendezvouses for Arnold's testimony was the same brand of outrageous, conscience-shocking, conduct that violated the universal sense of justice and warranted dismissing the *Chon* charges. If Judge Dandurand had been presented with evidence Ahsens, McCormick, and Quick had arranged "special visits" with "alone time" for sexual rendezvouses, then there is a reasonable probability he would've granted the motion to preclude death in light of his comments when he heard counsel's motion and may even have dismissed. *Cf. Chon*.

Moreover, the prejudice to Barton is underscored by the fact the juries in trials two, three, and four heard Arnold's fabrications about Barton having admitted killing Gladys(Ex.241p.322-27,328-29,335;Ex.242p.780-81,798-800;Ex.244p.727-53 reading from Ex.242p.778-802), but those three juries all heard the **only** consideration given Arnold was a favorable parole board letter (Ex.241p.323;Ex.242p.781;Ex.244p.730,752-53). As Judge Dandurand noted, Barton was prejudiced by the state's known prior misconduct because the state kept "improving" its case with its snitches(Ex.247p.45). None of those three juries got to hear the truth that Arnold got more than a favorable parole letter, he also got sexual rendezvouses which was itself compelling evidence that would've incensed the jurors'

sensibilities and consciences and caused them not to convict Barton and a fifth trial to have never occurred.[6] Furthermore, the fifth trial jury heard in opening that Arnold would testify Barton admitted "he killed an old lady by cutting her throat, stabbing her, cutting an X on her"(Ex.247p.441).

The outrageousness of Ahsens' conduct throughout is simply underscored by his misrepresentations to the parole board the "only" consideration Arnold sought was Ahsens write the parole board(Ex.131). Moreover, Quick's letter to Brandy, enclosing a copy of Ahsens' parole board letter, indicating they'd try to be at Arnold's parole hearing, underscores the lengths Ahsens contemplated going for Arnold(Ex.131).

Clearly Erroneous Findings

The credibility of Arnold's and Brandy's testimony that Ahsens' deal with Arnold included "special visits" with "alone time" for sexual rendezvouses, was independently proven from the contents of documents that existed long before Arnold's and Brandy's 29.15 testimony and any purported motive to fabricate could be ascribed to them in the findings A.A.G. Bruce[7] wrote and 29.15 court signed.

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[6] Besides the sexual rendezvouses, Arnold's December, 1994 letter shows McCormick got Arnold McDonald's fast-food(Ex.181p.3).

[7] In Bruce's e-mail exchange with Ahsens about Ahsens potentially having to retry Barton before Judge Sims, Bruce wrote: "I suspect that the decision was based on the

Arnold testified at the second trial on October 26,1993(Ex.241 at Index and 322) and at the third trial on April 12, 1994(Ex.242p.778;Ex.242 Index at pgs.F-G).

Arnold's May 25, 1993, letter (postmarked 5/27/93) to Brandy, included he couldn't wait to be with Brandy in October, 1993, because part of what he negotiated was they'd be left alone for a long time so they could have sex(Ex.17p.11;Ex.208p.18-21). Arnold then described in graphic detail how sexually satisfied Brandy would be(Ex.208p.18-21;Ex.17p.11).

Exhibit 83 was a letter Arnold wrote Brandy dated December 8, 1993 (postmarked 12/16/93), in which he directed her "to tell Curtis and Bob that same deal as last time Ozark or no deal, and we want all our visits in the breathalizer [sic] room."(29.15Tr.362;Ex.83p.11-12).

Exhibit 146 was a letter postmarked April 25, 1994, Arnold sent from Farmington(Ex.208p.27). That letter included:

> I got a toy for ya! So have I told you how good you made me feel in Ozark. I really liked it. I really liked it **in Tim's office** downstairs. I like going slow. Made me come so fast, though. You're yummy. I can't wait to really make love to you. I can't ever take the time down there to make you feel really good. I'm - I'll make up for the way you make me feel. Okay, baby. I love you.

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judge's [Judge Sims] dislike of his predecessor, who tried the case, [Judge Scott] as more than the merits."(29.15L.F.460)(bracketed material added).

(Ex.208p.27-28;Ex.146p.5-6)(emphasis added). Arnold said "Tim" was Tim McCormick, the Christian County P.A., and he and Brandy had sex in McCormick's office and both Ahsens and McCormick knew it was happening there(Ex.208p.28). Arnold and Brandy had sex a total of four or five times while he was held in Christian County and brokered through Ahsens, McCormick, and Quick(Ex.208p.44). Brandy testified Exhibit 146 from April, 1994, *supra*, was a reference to she and Arnold having had sex in Christian County P.A. Tim McCormick's office(29.15Tr.363-64).

Initially, Brandy balked at testifying and 29.15 counsel had to get an order for her Arkansas deposition(29.15L.F.663-68;29.15Tr.44-45). Brandy's reluctant witness status underscores she wanted nothing to do with this and had nothing to gain. Ultimately, Brandy testified in-person.

Brandy testified Ahsens called her to enlist her to persuade Arnold to testify against Barton(29.15Tr.347-50). Brandy also communicated with A.G. investigator Quick(29.15Tr.349). Brandy also got calls from Arnold directing her to communicate with Ahsens and Quick(29.15Tr.350). Brandy had discussions with both Ahsens and Quick about Arnold testifying against Barton which was conditioned on them arranging so she and Arnold could have "special visits" with "alone time" for sex in Christian County(29.15Tr.348-49,364-65,368,374,378-79,383).

Brandy testified Arnold was trying to get paroled so they'd be together(29.15Tr.365). The understanding was, that in exchange for Arnold testifying against Barton, Ahsens would write the parole board and she and Arnold would get special, alone visits to have sex(29.15Tr.363-65,374-75). Brandy personally

negotiated the special alone visits with both Ahsens and Quick and Arnold testifying against Barton was conditioned on them getting those special visits(29.15Tr.378). Brandy discussed with the A.G.'s Office the special alone visits she and Arnold got so they avoided having jail guards sitting right next to them and staring, and that was "part" of the deal negotiated(29.15Tr.368,378). Brandy testified she and Arnold got to have unsupervised visits lasting hours(29.15Tr.356-58,377-78).

Ozark Police Chief Marler wrote a parole board letter for Arnold(Ex.131). Marler told Brandy other inmates didn't get the kind of special alone visits she and Arnold got(29.15Tr.378).

Barton was prejudiced even though Arnold didn't testify in the fifth trial (29.15L.F.987,997,1023-24) because all the prior juries never heard about Arnold's concealed deal for "special visits" with "alone time" for sexual rendezvouses, and had they known, there's a reasonable probability they wouldn't have convicted Barton and never got to a fifth trial. Moreover the fifth trial's jury heard Bradley's graphic opening that Arnold would testify "he killed an old lady by cutting her throat, stabbing her, cutting an X on her," but Arnold didn't testify(Ex.247 at 441).

Dandurand noted: "[t]he only time the jury got to hear a fair crack" it hung(Ex.247 at 45). The truth is Barton **never has gotten "a fair crack"** because: (a) Allen, who testified for the first time at Barton's third trial, was not exposed for the liar she is until after the fourth trial; (b) in trials two through four the jury heard Arnold's fabricated testimony; and (c) the trial five jury heard Bradley represent how

both Arnold and Dorser would describe shockingly gruesome details Barton was alleged to have admitted, but then neither were called. *See* Point XII.

The record shows Brandy clearly testified with cogent reasons why she kept Arnold's letters twenty years(29.15L.F.995) - they were part of her life and memories and they were like pictures of one's children which wouldn't be discarded(29.15Tr.343-45).

Arnold wasn't serving a life sentence plus 280 years when he testified in-person at the second (October, 1993) and third trials (April, 1994)(29.15L.F.995-96). Arnold testified at the second trial he was convicted of second degree murder and burglary and he hoped Ahsens' writing the parole board helped(Ex.241p.322,335). At the third trial, Arnold testified he was convicted of second degree murder and serving fifteen years(Ex.242p.779-80,790). On the questioning that occurred outside the fifth trial's jury in March, 2006, Arnold testified he was then in prison for kidnapping, armed criminal action, and attempted escape(Ex.247p.722). For Barton's 29.15, Arnold testified his priors were for **a 1992 Christian County** second degree murder and burglary charges for which he was sentenced to fifteen years and that he was seeking to get paroled when he was deal making with Ahsens(Ex.208p.29-30). At Barton's 29.15, Arnold also testified that when he sent his "crooked stuff" letter he was serving a sentence arising out of a **2005 Camden County** case for which he was convicted of kidnapping, armed criminal action, and attempted escape for which he

was sentenced to life plus 280 years(Ex.208p.28-29).[8] What Arnold's testimony and the records reflect is Arnold eventually was paroled on the Christian County murder he was serving when Ahsens, McCormick, and Quick brokered their sexual rendezvouses deal in order to have committed the Camden County offenses.

That Arnold was serving a 15 year sentence, and not a 280 year sentence, when he testified in 1993 and 1994, viewed in conjunction with Arnold's letters to Brandy and Brandy's parole board letter, establishes Arnold and Brandy had planned to marry(29.15L.F.995-96). In Arnold's letter to Brandy postmarked July 26, 1993, he asked her to return their marriage application to the prison chaplain(Ex.47p.1). In Arnold's August 25, 1993 letter (postmarked 8/26/93), Arnold stated he was taking their marriage application to the chaplain(Ex.61p.1). On December 8, 1993, Arnold wrote he hoped he got a good parole outdate so he could be with Brandy(Ex.83p.2). Exhibit 111 is an undated letter from Brandy to the Parole Board in which she stated she planned to marry Arnold "as soon as he is released"(Ex.111p.1). Brandy testified they never married because they broke-up(29.15Tr.347).

There was no significant contradiction between Arnold's and Brandy's testimony about the details of their sexual rendezvouses(29.15L.F.997). Arnold

[8] Searching https://web.mo.gov/doc/offSearchWeb/search.jsp, while inserting Arnold's Department of Corrections Offender Inmate #184991, reflects Arnold's "active offenses" as kidnapping, escape, and armed criminal action with life plus 280 years and "completed sentence not found." (Visited 10/21/13).

testified the "crooked stuff" referred to arrangements for sex with Brandy in Christian County's Jail breathalyzer room and Christian County P.A.'s Office in exchange for testifying against Barton(Ex.208p.11-12). Arnold testified part of the deal struck with Ahsens was Ahsens would write a favorable parole board letter(Ex.208p.18-19). Ahsens also expressly agreed he'd make arrangements so Arnold could have sex with Brandy(Ex.208p.18-21). Arnold recounted Ahsens and Quick communicated with Arnold and Brandy about the details of arranging their sexual rendezvouses(Ex.208p.18-21).

Arnold's April 25, 1994, letter discussed how wonderful his sexual experience was "in Tim's office" and that "Tim" was Ahsens' co-counsel, Christian County P.A. Tim McCormick(Ex.208p.27-28;Ex.146p.5-6). Arnold reported they had sex four or five times while he was confined in Christian County's Jail as part of the deal with Ahsens and McCormick(Ex.208p.44).

Brandy testified she had discussions with both Ahsens and Quick about Arnold testifying against Barton, which was conditioned on them arranging so she and Arnold had "special visits" with "alone time" to have sex in Christian County(29.15Tr.348-49,364-65,368,374,378-79,383). Brandy testified she and Arnold had sex multiple times at the Christian County Courthouse/Jail which included having sex in the P.A.'s Office(29.15Tr.372-76). When they had sex in a chair in McCormick's Office she saw Ahsens and Quick in McCormick's office who left so she and Arnold could have sex(29.15Tr.374-75).

Brandy testified the understanding was, in exchange for Arnold testifying against Barton, Ahsens would write a parole board letter and she and Arnold would get to have special, alone visits to have sex(29.15Tr.348-49,364-65,368,374,378-79,383). Brandy personally negotiated the special alone visits with both Ahsens and Quick and Arnold testifying against Barton was conditioned on them getting those visits(29.15Tr.378-79). Brandy discussed with the A.G.'s Office the special alone visits she and Arnold got so they avoided having jail guards sitting next to them and staring(29.15Tr.378).

Arnold's April 25, 1994, letter (Ex.146), *supra*, describing how much he liked his sexual experience in Christian County Prosecutor Tim McCormick's Office, and Arnold's May - June, 1994, 77 page "letter," referencing how they "romped in the prosucter's [sic] office"(Ex.158Ap.2), establish the sexual rendezvouses happened pursuant to an agreement with Ahsens, McCormick, and Quick. Inmates are **NEVER** taken to a prosecutor's office, much less one convicted of murder, and the only reason that happened here was because there was an agreement arrangements be made so Arnold and Brandy had the opportunity to have sex while he was in Christian County. Likewise, inmates are **NEVER** given free rein to a breathalyzer room for visiting. According to the findings, even if Arnold and Brandy had sex it wasn't pursuant to respondent's agreement(29.15L.F.997,1023). What this finding ignores is Arnold got a benefit other inmates never get - **special alone visits** in rooms other inmates never get access to, which afforded Brandy and him **the opportunity for sex**.

Exhibit 83 was a letter Arnold wrote Brandy dated December 8, 1993, (postmarked 12/16/93), in which he directed her "to tell Curtis and Bob that same deal as last time Ozark or no deal, and we want all our visits in the breathalizer [sic] room." (29.15Tr.362;Ex.83p.11-12). This letter independently confirms Arnold's and Brandy's reporting that they had sex in the breathalyzer room and their sexual rendezvouses were part of the Ahsens and Quick brokered deal.

Both Arnold and Brandy testified their sexual rendezvouses were part of the deal Ahsens, McCormick, and Quick negotiated for Arnold's testimony against Barton. When Judge Sims granted 29.15 relief from the fourth trial, he found Allen's Indiana charges attorney was informed by Ahsens' investigator, Dresselhaus, that if Allen agreed to testify against Barton her Missouri charges would be dismissed(Ex.224p.100). Sims noted Allen's Indiana attorney's testimony was uncontroverted and Sims inferred if Dresselhaus were called he would've testified the same(Ex.224p.100). Arnold's and Brandy's testimony was uncontroverted by respondent and the only reasonable inference is that respondent didn't call Ahsens, McCormick, or Quick to refute Arnold and Brandy because the deal they struck with Arnold included agreeing to making the opportunity available to them for sexual rendezvouses. *Cf*. Judge Sims' Finding on respondent's failure to call Dresselhaus(Ex.224p.100).

Moreover, Judge Sims' 29.15 findings are enlightening as to why Ahsens wasn't called. Judge Sims found that **he didn't believe Ahsens' testimony** he disclosed Allen's criminal history(Ex.224p.97-98). Judge Sims also found because of

Cass County A.P.A. Cole's letter to Ahsens, "it is clear that Mr. Ahsens was aware, prior to trial, that Ms. Allen had received consideration for her testimony."(Ex.224p.100-01). If Ahsens, (or McCormick, or Quick) could've provided credible testimony that providing the opportunity for sexual rendezvouses wasn't part of the deal negotiated with Arnold, respondent would've called him (them) at the 29.15.

Arnold testified they had sex 4-5 times in Christian County, while Brandy testified they had it multiple times - "a few times," "[m]ore than once," "a few times"(Ex.208p.44;29.15Tr.372-76,378,380-81). Respondent's findings the 29.15 court signed (29.15L.F.9-10,688-744,938-46;29.15Tr.566-67) include Brandy contradicted Arnold's claims of having sex four times by saying they "had sex quite a few times"(29.15L.F.987,997,1023-24). Brandy testified they didn't have sex during "most of their visits" and corrected misspeaking when she initially stated they had sex "quite a few times" to limit it to "a few times"(29.15Tr.380-81). This should be contrasted with respondent having no qualms about disregarding the truth with Allen who reported different numbers of times Barton admitted killing Gladys. At the third trial, Allen didn't specify any number of times(Ex.242p.808-13). At the fourth trial Allen reported it was twice and at the fifth trial Allen claimed it was "at least five times"(Ex.244p.770-71;Ex.247p.933-34). Allen's ever increasing number of times only underscores Judge Dandurand's statement Barton was prejudiced by respondent's conduct throughout because, with each retrial, respondent improved its case with its snitches(Ex.247p.45).

The sexual rendezvouses deal is part of a long documented history of Ahsens not playing by the rules in Barton's and other defendants' cases. Counsel was ineffective for failing to personally investigate Arnold when he wrote there was "crooked stuff" going on with respondent's witnesses, and counsel abdicated and delegated their role to the A.G. to investigate Arnold's letter. *See Strickland*. Barton was prejudiced because had Judge Dandurand heard Arnold received special alone visits for sexual rendezvouses in exchange for his testimony, there's a reasonable probability Dandurand would've prohibited respondent from seeking death or dismissed. *See Strickland* and *Chon*. This Court should, at a minimum, reverse Barton's death sentence and impose life without parole, or alternatively, reverse and order the charges dismissed with prejudice.

II.

SELVIDGE'S CALL - THEN HAVING SEX WITH HARREL'S BOYFRIEND

The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03 by not disclosing Debbie Selvidge's two interrelated priors involving same victim, Billie Harrel, with one involving Selvidge's violating a protective order for calling Harrel to say she was then having sex with Harrel's boyfriend, because Barton was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Selvidge was "a crucial witness" whose "credibility [was] important" because her testimony repudiated Barton having inadvertent blood transfer and respondent relied on statements she attributed to Barton as admissions, but Selvidge's undisclosed priors with the Harrel call would have significantly cast doubt on Selvidge's credibility.

Respondent didn't disclose Selvidge's two interrelated priors involving same victim Billie Harrel with the underlying premise of one being Selvidge harassed Harrel calling to tell Harrel she was then having sex with Harrel's boyfriend. Such outrageous conduct would've substantially impeached Selvidge who Bradley testified was "a crucial witness" and the Findings stated her "credibility [was] important."

Exhibits' Contents

On April 18, 2002, Selvidge was charged in Count I with violating on or about March 23, 2002, a protective order prohibiting Selvidge from communicating with

Billie Harrel(Ex.248p.1,3). Count II charged Selvidge with third degree assault of Harrel by striking her in the face(Ex.248p.3). On June 10, 2002, Selvidge pled guilty to assault and was sentenced to 90 days jail with execution suspended and two years probation and the violating a protective order was dismissed(Ex.248p.5). A condition of probation was no contact with Harrel(Ex.248p.6).

On January 27, 2003, Selvidge was charged with violating on or about August 20, 2002, a protective order prohibiting Selvidge from communicating with Harrel when she initiated communication with Harrel by phone(Ex.249p.1,4). Officer McCulley's Probable Cause Statement recited Harrel reported Selvidge called her to say Selvidge was having sex with Harrel's boyfriend and Selvidge hung-up(Ex.249p.5). On May 20, 2003, Selvidge pled guilty to violating a protective order and was sentenced to 90 days jail with execution suspended and placed on two years probation(Ex.249p.7).

Bradley's Testimony

A.A.G. Bradley described Selvidge as "a crucial witness"(29.15L.F.763).

Selvidge's Trial Testimony

Selvidge testified Barton told her not to go down the hall towards Gladys' bedroom stating: "Ms. Debbie, don't go down the hall. Ms. Debbie, don't go down the hall"(Ex.247p.516). Selvidge testified no one tried to keep her from touching Gladys' body when they saw it(Ex.247p.518). Selvidge testified Barton never pulled her away from the bedroom(Ex.247p.518). Selvidge denied she had previously reported Barton reached around her to pull her away from Gladys' body, but then said

she was under much stress, and therefore, might've erroneously told Officer Hodges that(Ex.247p.523,526).

Officer Hodges' Testimony

Barton told Hodges he got blood on himself while slipping in blood when he pulled Selvidge away from Gladys' body(Ex.247p.550-51,555-56).

Officer Merritt's Testimony

Officer Merritt testified Barton explained to Hodges he got blood on himself when he pulled Selvidge away from Gladys(Ex.247p.672,683).

Respondent's Guilt Argument

Cleek argued in initial guilt closing argument that Barton's statement telling Selvidge not to go back to Gladys' bedroom was evidence of guilt(Ex.247p.1021). Cleek argued Selvidge testified Barton was never inside Gladys' bedroom where her body was found(Ex.247p.1021). Cleek argued Barton never having been in Gladys' bedroom refuted Barton's explanation to police that he got blood on himself when he slipped trying to take Selvidge out of the bedroom(Ex.247p.1021-22). Cleek argued Barton's guilt was demonstrated by Selvidge's recounting of Barton's alleged statements: "I'm sorry, Ms. Gladys. I'm sorry. I'm sorry, Ms. Gladys."(Ex.247p.1022-23).

In rebuttal, Bradley argued Barton's guilt was demonstrated because he said to Selvidge:

"Ms. Debbie, don't go down there. Don't go down the hall." He knew what was there. He didn't want her to see it. His conscience had briefly came up for a short time.

(Ex.247p.1052-53).

Counsels' Testimony

Bruns testified Selvidge's priors weren't disclosed, but if they had he would've used them to cross-examine her even though there was a generalized strategy of wanting Selvidge off quickly because she was emotional(29.15Tr.512-14,533-36). Kessler testified any cross-examination involving Selvidge's priors would've been Bruns' decision, if they'd been disclosed(29.15Tr.433-34).

Findings

Bradley made every effort to disclose witness criminal histories because of this case's history(29.15L.F.1004,1006). The defense had no recall or knowledge of whether they knew of Selvidge's convictions, and therefore, they didn't know if the decision to not impeach Selvidge was strategic(29.15L.F.1005).

The findings stated: "Ms. Selvidge's credibility [was] important"(29.15L.F.1005). Assuming Selvidge's convictions weren't disclosed they wouldn't have seriously impeached her because they don't impact credibility(29.15L.F.1005-06). The only contested issue involving Selvidge was whether Barton did or didn't move Selvidge away from Gladys(29.15L.F.1005).

Prejudicial *Brady* Violation

The defendant in *Chism v. Cowan*,425S.W.2d942,943,947(Mo.1967) challenged judgment for the plaintiff in a damages action involving an assault and battery. The defendant was a doctor who shot the plaintiff for trespassing. *Id.*943-46. The defendant complained some cross-examination of him was improper because its focus was to portray his vicious nature and even though he was a doctor, he had no respect for life. *Id.*947-48. This Court rejected that challenge:

> on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity, or credibility, **or to shake his credit by injuring his character**. He may be compelled to answer any such question, however irrelevant in [sic] may be to the facts in issue, and however **disgraceful** the answer may be to himself, except where the answer might expose him to a criminal charge.

*Id.*948(emphasis added). *See also*, *Black v. State*,151S.W.3d49,55(Mo.banc2004)("a witness may be asked any questions on cross-examination that tend to test accuracy, veracity, or credibility, or shake the witness' credit by **injuring his or her character**.")(emphasis added).

The critical undisclosed matters here weren't the two priors and their charge labels, but instead the available evidence that could've been used "to shake [Selvidge's] credit by injuring [her] character" through revealing her "disgraceful" behavior. *See Cowan*. Counsel didn't need to seek to admit the priors. Counsel who got disclosure of all the supporting documents only had to elicit that Selvidge had a protective order against her involving Harrel and despite that order harassed Harrel by

calling Harrel to say she was having sex with Harrel's boyfriend. Such inquiry would've significantly undermined Selvidge's credibility because a person with judgment so impaired as to make that call cannot be trusted. *See Cowan*. Moreover, this information would've shown Selvidge has a history of lack of respect for the rule of law when she violated a protective order, and therefore, couldn't be trusted to respect the rule of law to testify truthfully. This was especially true because the findings stated Selvidge's "credibility [was] important" (29.15L.F.1005) and Bradley characterized her as "a crucial witness"(29.15L.F.763).

To prevail under *Brady v. Maryland*,373U.S.83(1963), a defendant must establish: "(1) The evidence at issue must be favorable to him, either because it is exculpatory or because it is impeaching of an adverse witness; (2) that evidence must have been suppressed by the State, whether willfully or inadvertently; and (3) he must have been prejudiced." *State ex rel. Woodworth v. Denney*, 396S.W.3d330,338(Mo.banc2013)(*relying* on *Strickler v. Greene*,527U.S.263,281-82(1999)). *See also, Taylor v. State*,262S.W.3d231,240(Mo.banc2008). *Woodworth* noted that in determining prejudice the U.S. Supreme Court has stated: "'A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.'" *Woodworth*,396S.W.3d at 338(quoting *Kyles v. Whitley*,514U.S.419,434(1995)). Instead, a defendant's burden is only to show "a reasonable probability" of a different result measured by whether the verdict is worthy of confidence. *Woodworth*,396S.W.3d at 338. *See also, Taylor v. State*,262S.W.3d at 240.

The undisclosed evidence would've impeached Selvidge. *See Cowan* and *Woodworth*. Bradley's good faith is irrelevant - the available Selvidge information was undisclosed. *See Woodworth*.

Selvidge's "credibility [was] important" and she was "a crucial witness"(29.15L.F.763,1005). Selvidge's testimony no one tried to keep her from touching Gladys' body, and Barton didn't take any actions towards her that could've caused him to inadvertently get blood on him (Ex.247p.518), were devastating to Barton's defense that the small amount of blood on him was caused by him attempting to pull Selvidge from Gladys' body(Ex.247p.550-51,555-56,672,683). Had Selvidge's credibility been challenged using the call to Harrel there's a reasonable probability of a different result such that the verdict is unworthy of confidence and Barton was prejudiced. *See Woodworth*.

The prejudice of Selvidge not being impeached, as she could have been, was only accentuated by the prosecutors' closing arguments which relied so heavily on what Selvidge reported. Cleek argued Selvidge should be believed that Barton never sought to prevent her from touching Gladys and he didn't pull her from Gladys' bedroom, and therefore, Barton didn't get blood on him through inadvertent contact (Ex.247p.1021-22). Cleek in initial argument, and Bradley in rebuttal, argued Barton's statements to Selvidge to not go back to Gladys' bedroom were admissions constituting consciousness of guilt (Ex.247p.1021,1052-53). Cleek also argued Selvidge's reporting of statements she attributed to Barton, "I'm sorry, Ms.

Gladys. I'm sorry. I'm sorry, Ms. Gladys" (Ex.247p.1022-23), constituted evidence of Barton's consciousness of guilt.

Contrary to the findings (29.15L.F.1005) Bruns testified Selvidge's prior convictions were undisclosed and if they had been he would've used the available information to cross-examine her(29.15Tr.512-14,533-36). Moreover, contrary to the findings, respondent relied on Selvidge for much more than refuting Barton's inadvertent contact explanation for why there was blood on his clothing (29.15L.F.1005), it argued statements Selvidge attributed to Barton as evidence of consciousness of guilt(Ex.247p.1021-23,1052-53).

Respondent's failure to disclose Selvidge's priors, and in particular her call to Harrel that she was having sex with Harrel's boyfriend, would've significantly impeached Selvidge such that there's a reasonable probability of a different result and the verdict is unworthy of confidence. *See Brady* and *Woodworth*.

Separate and apart from the obligations *Brady* imposed, Rule 25.03(A)(7) required respondent disclose Selvidge's priors. Rule 25.03(A)(7) required respondent disclose: "Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial." Rule 25.03(A)(7) mirrors *Brady* so whether analyzed under *Brady* or Rule 25.03(A)(7) Barton is entitled to relief.

A new trial is required.

III.

***BRADY* VIOLATION - HORTON NOTES**

The motion court clearly erred finding respondent did not violate *Brady* and Rule 25.03, by withholding Carol Horton's statements from prosecution interview notes because Barton was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV in that the Horton notes showed a radio was playing in Gladys' trailer when Horton checked on her at 4:15, but when Horton returned at 5:30-5:40, none was playing; the notes could have been used to refresh Horton's recollection or impeach her testimony she heard nothing at 4:15, and also to prove there was no radio playing at 5:30-5:40 because these events establish either Gladys or the true perpetrator turned her radio off between 4:15 and 5:30-5:40, and thus, Gladys was alive outside respondent's 3:00-4:00 timeframe and Barton did not kill Gladys.

Exhibit 253 was undisclosed notes from a prosecution interview of Carol Horton. They could've been used to refresh Horton's recollection or impeach her on what she did or didn't hear and when. The notes supported Barton's defense someone else killed Gladys because they demonstrated Gladys was alive outside respondent's 3:00-4:00 timeframe when Barton was alleged to have killed her.

This Court previously found, while reversing Barton's third trial for limiting closing argument on respondent's timeframe: "The prosecution's theory of the case was that Barton killed Mrs. Kuehler in her trailer home sometime between 3:00-4:00

in the afternoon." *State v. Barton*,936S.W.2d781,782(Mo.banc1996). Barton's claim is respondent's case was premised on him having killed Gladys between 3:00-4:00 p.m. and if counsel had possessed the Horton notes they could've established Gladys was alive at 4:15 and Barton's whereabouts at places other than Gladys' trailer was substantially accounted for at 4:00 onward.

Respondent's Guilt Opening

Respondent's timing theory was outlined in fifth trial opening and it remained 3:00-4:00 p.m.(Ex.247p.433-36).

Horton's Fifth Trial's Testimony

Horton testified she last saw Gladys at 11:00 a.m.(Ex.247p.455). Barton was at Horton's trailer from noon-2:00 p.m. and was relaxed(Ex.247p.452-53,456). At 2:00, Barton went to Gladys' to borrow $20.00(Ex.247p.452-53,456-57). Barton returned to Horton's at 2:15 and remained until 3:00(Ex.247p.457-58).

Horton testified that at 3:00, Barton went back to Gladys' and returned to Horton's at 4:00(Ex.247p.458-59). Barton used the bathroom for a long time, ten minutes(Ex.247p.459-61). Barton said he'd been working on a car(Ex.247p.459-61). Barton no longer appeared relaxed(Ex.247p.460-61).

Significantly, Horton testified she went to Gladys' at about 4:15, but Gladys didn't answer and everything was "**silent"**(Ex.247p.461-63)(emphasis added). Gladys typically took afternoon naps and Horton assumed Gladys was asleep(Ex.247p.463-64). Before Horton left for Gladys', Barton discouraged her going because Gladys was napping(Ex.247p.462-63).

Horton testified she returned to her trailer at 4:30(Ex.247p.464). Barton was at one of Horton's neighbors and he came over and repaired Horton's porch and left(Ex.247p.464-65).

Horton recounted that at 6:00-6:30, Gladys' granddaughter, Selvidge, came to Horton's(Ex.247p.466). Selvidge had tried to call Gladys(Ex.247p.466-67). At 7:00 p.m., Barton was at Horton's next door neighbor's house and Selvidge asked Barton to go with them to Gladys' to check on her(Ex.247p.466-67). They knocked on Gladys' door, but got no response(Ex.247p.470-71). When a locksmith, opened the door Selvidge found Gladys' body in her bedroom(Ex.247p.472-73,477).

Guilt Defense Timing

During the defense case, Brenda Montiel's prior testimony was read(Ex.247p.970). Montiel lived in the trailer park and knew Barton(Ex.247p.970-71). Barton was at her house three times(Ex.247p.971-72). The first time Montiel saw Barton was at about 5:30 p.m. and **he came to her house to ask if she had seen Gladys because people were looking for Gladys**(Ex.247p.971-72). On the third occasion, Barton visited Montiel, she was preparing dinner and invited Barton to stay and he ate with her(Ex.247p.972-73). Barton was with Montiel eating dinner for forty-five minutes to one hour(Ex.247p.972-73).

Respondent's Guilt Closing

Cleek devoted initial closing argument to how the 3:00-4:00 timeline established guilt. Cleek argued Horton saw Barton at her house around noon and Barton stayed a couple hours(Ex.247p.1017). Respondent's evidence showed the

Bartletts were at Gladys' from about 2:00 until 2:45(Ex.247p.1017-18). The evidence showed Barton was at Gladys' between 2:00 and 2:10 and Barton was at Horton's at 2:15(Ex.247p.1018). The Bartletts left Gladys' at 2:45 and the Pickerings arrived then(Ex.247p.1018).

Cleek argued that according to Horton, Barton left Horton's at 2:30(Ex.247p.1019-20). Barton returned to Horton's around 2:45(Ex.247p.1019-20). Everyone had left Gladys' by 3:00(Ex.247p.1020). The Pickerings called Gladys' at 3:00 and a male answered stating Gladys was in the bathroom(Ex.247p.1019-20). Barton returned to Horton's and washed his hands(Ex.247p.1020). When Horton started to go to check on Gladys, Barton told Horton not to because Gladys was sleeping(Ex.247p.1020-21).

Bradley in rebuttal corrected Cleek stating Cleek "got the time wrong" and argued it was 3:15 when Pickering called Gladys and Barton answered stating Gladys was in the bathroom(Ex.247p.1048).

Bradley continued no one saw Gladys after the Bartletts saw her around 3:00, but Barton was in Gladys' trailer at 3:15(Ex.247p.1048). Barton told Officer Hodges he was at Gladys' around 2:00 or 2:30 and left(Ex.247p.1048). Barton was back at Gladys' at about 4:00 and Gladys wrote him a check he discarded(Ex.247p.1048-49).

Bradley's concluding comments urged the jury convict because Barton answered Gladys' phone at 3:15 and Barton acknowledged to Officer Merritt doing so(Ex.247p.1055).

Defense's Guilt Closing

Kessler's closing noted Cleek took "a large amount of time trying to explain the time line"(Ex.247p.1028). Respondent showed only Barton was at Gladys' between 2:00 and 4:00 and at 3:15 Barton answered the phone(Ex.247p.1028-29). Respondent's timeline wasn't established(Ex.247p.1033).

Horton's and Hampton's 29.15 Testimony

Horton testified she met with Ahsens and his investigator "Joe"[9] sometime before 1998(29.15Tr.134). Horton went to Gladys' at 4:15 and then at 5:40(29.15Tr.133). Horton recounted that at 4:15 a radio with static was playing inside Gladys'(29.15Tr.133-34). When Horton returned at 5:40 the radio wasn't playing(29.15Tr.134). If trial counsel had asked whether Horton had heard a radio at 4:15, but heard nothing at 5:40 she would've so testified(29.15Tr.136-37).

Michelle Hampton testified she saw Barton working on Horton's deck at 4:00-4:20 p.m.(29.15Tr.84).

Findings

Bradley neither recognized nor authored Ex.253, the Horton notes, that were in the Christian County Prosecutor's file(29.15L.F.1004 relying on Bradley Depo.29.15L.F.778-79;29.15L.F.1010).

[9] Horton identified "Joe" as an attorney (29.15Tr.134), but the record supports she was referring to A.G. investigator "Joe" Dresselhaus(*See* Ex.301p.1 Newhouse's report referencing Joseph Dresselhaus).

Barton failed to explain how the Horton notes established innocence(29.15L.F.1008,1014-15). The notes and the basis for their information is unknown and unexplained(29.15L.F.1008,1010,1015). Without knowing the author, it cannot be determined if the notes were from a Horton interview(29.15L.F.1010).

The Horton document is double inadmissible hearsay of an unknown person reporting what Horton may say(29.15L.F.1008,1011-13,1015). Horton couldn't be impeached with the notes unless their author was established and Horton made the statements(29.15L.F.1012-13). It cannot be determined if the notes were in the prosecution's files in 1992, 1993, 2000, 2002, 2006, or 2010 or after the fifth trial(29.15L.F.1008,1010).

The notes information isn't new because Horton testified at the preliminary hearing she heard Gladys' radio playing(29.15L.F.1008,1012-14 relying on Ex.238p.19). At the 29.15, Horton testified when she went to Gladys' the first time she thought she might've heard briefly radio-like static(29.15L.F.1013). The note says "4:15 goes to V's trailer - no response - hear radio."(29.15L.F.1013). The "hear radio" may have been the author's summary of Horton briefly hearing radio static(29.15L.F.1013). Barton didn't ask counsel explain the importance or exculpatory value of the radio being heard after 5:30 p.m.(29.15L.F.1008). Any uncertainty or inconsistency Horton had in 2006 about whether she did or didn't hear a radio or static wouldn't have altered the outcome(29.15L.F.1012-13).

Bruns testified respondent didn't establish a specific timeline, so Ex.253 was worthless(29.15L.F.1002,1014).

Bruns impeached Horton with prior testimony(29.15L.F.1014 relying on Ex.247p.499-500) on a more significant issue(29.15L.F.1014). That impeachment dealt with Barton's behavior after he returned from Gladys' and didn't succeed in undercutting Horton's credibility(29.15L.F.1014).

Counsels' Testimony

Bruns testified Ex.253, the Horton notes, were undisclosed(29.15Tr.521-22). Bruns would've used the radio on/off timing information (Ex.253p.3) to refresh Horton's recollection or impeach her on the timeline(29.15Tr.521-25). Bruns thought respondent hadn't been persuasive in establishing its timeline of Barton having gone to Gladys' trailer twice(29.15Tr.523-24,536-37,556-57). The Horton notes would've supported respondent was unable to prove a specific timeline for where Barton was at for critical times(29.15Tr.523-25). The defense was never able to definitively establish a timeline proving Barton's innocence(29.15Tr.556-57).

Kessler never saw the Horton notes and would've wanted them to challenge respondent's timeline(29.15Tr.449-52).

***Brady* Prejudice**

This claim is governed by *Brady v. Maryland*,373U.S.83(1963). In *State ex rel Engel v. Dormire*,304S.W.3d120(Mo.banc2010), this Court ordered a new trial based on a *Brady* violation. In *Engel*, this Court found it "irrelevant" as a response to Engel's *Brady* claim that the information was possessed by non-Missouri investigators who were part of the Missouri prosecution team because those investigators were "acting as the prosecutor's agents during the investigation."

*Id.*127. Under *Engel*, who generated the Horton notes is irrelevant because whoever did must've acted as a prosecution agent for them to be in the Christian County P.A.'s file.

It strains credulity for the 29.15 court to have signed respondent's findings that the Christian County P.A.'s file would contain a document detailing factual matters particular to Horton prepared after the fifth trial(29.15L.F.1008,1010). There simply is no logical goal driven reason for any state agent to have engaged in such a meaningless endeavor. Under *Brady* it doesn't matter when before the fifth trial's verdicts the Horton notes were generated as respondent was required to disclose them. *See Engel*. Moreover, the record clearly established the notes must've been generated before the fifth trial. Throughout the notes Horton was identified as either "Carol Horton," "Horton" or "CH"(*See* Ex.253). In contrast at the fifth trial, Horton testified her last name was formerly Horton, but her name was then Watkins(Ex.247p.447). Nowhere in the notes was Horton identified with her new last name, Watkins(*See* Ex.253).

A contextual review of the Horton notes considered in conjunction with Horton's 29.15 testimony reflects Ex.253 is notes from an interview respondent's agent had with Horton. Underneath the underlined name Carol Horton, the notes contain "505 W Church St"(Ex.253p.1). Horton lived at 505 West Church Street(Ex.238p.29). Nowhere in the fifth trial's transcript did Horton testify about any specific street address or addresses(Ex.247p.447-500). Rather Horton's testimony was limited generally to recounting having lived in the trailer park Gladys

managed(Ex.247p.447-51). The recording during an interview of a specific residence address is the type of information necessary for a prosecutor to have to call an interviewee, like Horton, at trial. At this 29.15, Horton testified Ahsens and his investigator Dresselhaus met with her sometime before 1998(29.15Tr.134).

The Horton notes included: "Gladys usually pleasant. Had her moments"(Ex.253p.1). This commentary on Gladys' personality was simply reflective of notes of an interview done of Horton and not a summary of other documents respondent possessed(*See* 29.15L.F.1010). This commentary on Gladys' personality, likewise, didn't appear in Horton's preliminary hearing testimony(Ex.238p.8-69)(*See* 29.15L.F.1010).

At Barton's preliminary hearing, Horton testified she went to Gladys' at 4:15 and her radio was "**playing**"(Ex.238p.19)(emphasis added) and that Horton previously so testified is something Barton acknowledges was available to counsel. At the fifth trial, however, Horton contradicted her preliminary hearing testimony when she reported she went to Gladys' house at about 4:15, but Gladys didn't answer the door and everything was "**silent"**(Ex.247p.461-63)(emphasis added). Ex.253 was important because it contained other information Horton had reported about the radio and it being off at 5:30-5:40. The withheld notes state Horton went to Gladys' trailer at 4:15 and got no response with the notation "hears radio" underlined(Ex.253p.3). The Horton notes state Horton returned to Gladys' to check on her at 5:30 to 5:40 p.m. and there was no answer, with the notation "no radio" underlined - something critical that was **unavailable elsewhere**(Ex.253p.3).

The Horton notes were critical because they supported a defense that the crime occurred outside respondent's 3:00-4:00 timeline when Barton's whereabouts could be substantially accounted for, and thereby, supported someone else did it. Establishing through Horton the radio was on at 4:15, but off at 5:30-5:40, would've supported Gladys was alive after respondent's 3:00-4:00 timeline because either Gladys or someone other than Barton, who was the actual perpetrator, would've had to have turned the radio off.

Bruns testified respondent wasn't particularly effective establishing its timeline(29.15Tr.523-24,556-57). Kessler testified the Horton notes would've challenged respondent's timeline(29.15Tr.449-52). If counsel had had the Horton notes, then they could've entirely repudiated respondent's 3:00-4:00 timeframe. Moreover, Bruns testified the defense was never able to definitively establish an exonerating timeline(29.15Tr.556-57), but if counsel had had the notes and used them either to refresh recollection or impeach (29.15Tr.521-25) they would've excluded Barton under respondent's timeline. That Bruns testified respondent didn't do a particularly good job establishing the 3:00-4:00 timeline (29.15L.F.1002,1014) doesn't establish lack of prejudice, rather that highlights the prejudice. Instead, if counsel had had the Horton notes, they could've obliterated respondent's case because it hinged on the 3:00-4:00 timeframe.

Ex.253 and its contents didn't have to be admissible and its use didn't depend on identifying its author. Bruns testified he would've wanted to use the time information about the radio being on and then off (Ex.253p.3) to either refresh

Horton's recollection or impeach her on the timeline(29.15Tr.521-25). A witness who doesn't recall or is uncertain about matters concerning which he is called to testify can refresh his memory by referring to a memorandum or writing. *State ex rel Williams v. Williams*,609S.W.2d456,459(Mo.App.,W.D.1980). When a witness can refer to a writing and then testify independent of it, the person's recollection is refreshed and is testifying from his recollection. *Id.*459. A document can be used to refresh recollection, even though the witness didn't prepare it. *Cusack Co. v. Lubrite Refining Co.*,261S.W.727,729(St.L.Ct.App.1924); *State v. Freeman*,489S.W.2d749,752-53(Spfld.Dist.1973).

Ex.253 could've been used to refresh Horton's recollection she had previously reported to a state agent during an interview the radio was on at 4:15, but off at 5:30-5:40. Horton testified at this 29.15 hearing the radio was playing with static at 4:15, but off at 5:40(29.15Tr.133-34). Thus, Horton would've had to acknowledge her mistake that at 4:15 it was "silent" at Gladys' trailer and Horton would've testified when she returned at 5:30-5:40 the radio was off.

Without the notes, and the specific information the radio was off at 5:30-5:40 p.m., counsel lacked the information and means critical to challenge respondent's 3:00-4:00 timeline. What counsel didn't have access to, and was only available in the Horton notes, was that when Horton returned to Gladys' at 5:30 to 5:40 p.m. there was "no radio"(Ex.253p.3). While Barton's counsel would've known from the preliminary hearing transcript that Horton testified the radio was on at 4:15, Barton's counsel had no way to know the preliminary hearing's significance since it stood

alone without the benefit of the notes' information that the radio was off at 5:30-5:40 p.m. It was critical for counsel to know the radio was off at 5:30-5:40 and that information was available **only** from the Horton notes.

The findings state counsel impeached Horton on a more significant issue of how Barton behaved on returning from Gladys'(29.15L.F.1014 relying on Ex.247p.499-500). The linchpin of respondent's case, however, was its 3:00-4:00 timeline. Moreover, that attempted impeachment failed. Horton disputed what Bruns asserted was an inconsistent statement accusing Bruns of taking her prior testimony out-of-context(Ex.247p.499-500).

To be allowed to impeach a witness with a prior inconsistent statement the witness must be given the opportunity to refresh his or her recollection of the prior statement and then allowed to admit, deny, or explain it. *Ferguson v.State*,325S.W.3d400,417(Mo.App.,W.D.2010). Even if counsel had attempted to refresh Horton's recollection and were unsuccessful, counsel could've used Ex.253 to impeach Horton by asking her whether she had previously told a state agent Gladys' radio was on at 4:15, but off at 5:30-5:40.

Contrary to the findings, what this case's history shows is respondent has steadfastly maintained its 3:00-4:00 timeline and it was critical to respondent's theory. In guilt opening, respondent outlined the 3:00-4:00 timeline and that Horton was a critical witness in establishing it(Ex.247 at 433-36,*supra*). Respondent relied on Horton to establish the 3:00-4:00 timeline through her recounting hers and Barton's comings and goings between Gladys'(Ex.247p.452-53,455-64,*supra*). The defense

evidence was gauged around calling Brenda Montiel to account for Barton's whereabouts during the early evening starting from 5:30 onward(Ex.247p.970-73,*supra*). Respondent's closing arguments were devoted to arguing Barton's comings and goings between Gladys' and Horton's and establishing Barton committed the acts between 3:00-4:00(Ex.247p.1017-21,1048-49,1055,*supra*). Defense counsel argued respondent failed to establish Barton committed these acts between 3:00-4:00(Ex.247p.1028-29,1033,*supra*). Thus, both parties' focal point was the 3:00-4:00 timeline and what was or wasn't proven. The crime's timing was not some triviality.

To prevail on a *Brady v. Maryland*,373U.S.83(1963) claim, a defendant must establish: "(1) The evidence at issue must be favorable to him, either because it is exculpatory or because it is impeaching of an adverse witness; (2) that evidence must have been suppressed by the State, whether willfully or inadvertently; and (3) he must have been prejudiced." *State ex rel. Woodworth v. Denney*,396S.W.3d330,338(Mo.banc2013). *See also*, *Taylor v. State*,262S.W.3d231,240(Mo.banc2008). *Woodworth* noted in determining prejudice the U.S. Supreme Court has stated: "'A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.'" *Woodworth*,396S.W.3d at 338(quoting *Kyles v. Whitley*,514U.S.419,434(1995)). Instead, a defendant's burden is only to show "a reasonable probability" of a different result measured by whether

the verdict is worthy of confidence. *Woodworth*,396S.W.3d at 338. *See also*, *Taylor v. State*,262S.W.3d at 240.

The Horton notes were exculpatory because they established Gladys must've been alive at 4:15 when Horton went to Gladys' and is outside the 3:00-4:00 timeframe respondent relied on to attribute this offense to Barton. The Horton notes information is exculpatory because if Gladys' radio was on at 4:15, but then off by 5:30 to 5:40, then either Gladys or the true perpetrator turned the radio off sometime between 4:15 and the 5:30-5:40 timeframe. *See Woodworth* and *Taylor*. This evidence could've been presented to support Barton's innocence defense. *See Woodworth* and *Taylor*. Contrary to the findings, there's no significance in the radio **being heard** after 5:30 (29.15L.F.1008) because the significance of the radio at 5:30 onward is that it **wasn't heard**.

Respondent's stipulation the Horton notes were in the Christian County P.A.'s file (29.15Tr.131) established it suppressed them and whether willful or inadvertent is irrelevant. *See Woodworth* and *Taylor*.

Barton was prejudiced when the Horton notes were suppressed. *See Woodworth* and *Taylor*. Counsel testified the notes would've challenged respondent's 3:00-4:00 timeframe and they would've used them to refresh Horton's memory or impeach her(29.15Tr.521-25). Horton testified at the 29.15 the radio was playing with static at 4:15, but off at 5:40(29.15Tr.133-34). If counsel had the notes, they would've presented substantial evidence establishing respondent's timeline didn't support Barton's guilt. The evidence would've shown either Gladys or the true

perpetrator turned the radio off sometime between 4:15 and the 5:30-5:40 timeframe, and thus, Gladys was alive outside respondent's claimed timeline. *See Woodworth* and *Taylor*. The importance of disproving respondent's timeline is underscored by this Court's reversal of Barton's third trial for respondent's improper objection to argument challenging respondent's timeline. *Barton*,936S.W.2d at 783-88.

Barton established a reasonable probability of a different result because the verdict is unworthy of confidence. *See Woodworth*. That lack of confidence was shown through the evidence that could've been elicited from Horton had the notes been disclosed. *See Woodworth* and *Taylor*. Moreover, there's a reasonable probability of a different result and the verdict is unworthy of confidence because Barton's whereabouts are accounted for at 4:00 p.m. and onward. Michelle Hampton testified at this 29.15, and in her prior testimony, she saw Barton working on Horton's deck at 4:00-4:20 p.m.(29.15Tr.84;Ex.244p.797-98). Montiel's prior testimony, read to the jury, included she first saw Barton at 5:30 p.m. and he came to her house to ask if she'd seen Gladys because people were looking for Gladys(Ex.247p.971-72). Montiel reported seeing Barton later and having dinner with him for forty-five minutes to one hour(Ex.247p.972-73).

In *Buchli v. State*,242S.W.3d449,455-56(Mo.App.,W.D.2007), there was a prejudicial *Brady* violation where respondent withheld evidence that would've cast doubt on its timeline. Withholding the Horton notes prevented counsel from affirmatively disproving respondent's 3:00-4:00 timeline. *See Buchli*.

Separate and apart from *Brady* obligations, Rule 25.03(A)(1) required respondent disclose the names and addresses of witnesses it intended to call "together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements." Rule 25.03(A)(1) mirrors *Brady* so whether analyzed under *Brady* or Rule 25.03(A)(1) Barton is entitled to relief.

A new trial is required.

IV.

FAILURE TO IMPEACH SELVIDGE - TIMING

LAST CONVERSATION WITH GLADYS

The motion court clearly erred denying counsel was ineffective for failing to cross-examine Selvidge with her prior testimony on when she last spoke to Gladys and for how long denying Barton effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have cross-examined her on those matters because respondent's case centered on its 3:00-4:00 timeline and highlighting Selvidge's prior inconsistencies regarding the timing and length of her last conversation with Gladys would have cast substantial doubt on respondent's timeline and Barton was prejudiced as the jury would not have convicted him.

Respondent's timeline had Barton killing Gladys between 3:00-4:00. Selvidge gave prior inconsistent testimony on when and for how long she last talked to Gladys and counsel should've cross-examined her about her prior testimony to cast substantial doubt on respondent's timeline.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). For strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*, 108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994). Counsel is ineffective when they fail to impeach critical

witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996).

Selvidge's Fifth Trial Testimony

Selvidge spoke many times daily with Gladys(Ex.247p.502-03). Gladys napped from 2:00-3:00(Ex.247p.505). Selvidge and Gladys phoned one another while watching the Povich show, which started at 4:00(Ex.247p.503,505-06). Selvidge last spoke to Gladys at 2:30 on October 9, 1991(Ex.247p.505). Selvidge tried phoning Gladys at 4:00 but couldn't reach her and that worried Selvidge(Ex.247p.505-06).

Pickering's Fifth Trial Testimony

Bill Pickering phoned Gladys about 3:15 and a male answered stating she was in the bathroom(Ex.247p.620-22). Barton told police it was him who answered Pickering's call(Ex.247p.538-39).

Selvidge's Prior Testimony

Selvidge's prior trials' testimony included that she last spoke to Gladys **after 3:00 for 20-25** minutes and that their routine was to watch Oprah at 4:00, not Povich(Ex.242p.519-23;Ex.244p.472-78).

Bradley's Guilt Argument

Bradley argued in guilt rebuttal that Barton answered Pickering's call to Gladys at 3:15, and therefore, that call placed Barton inside Gladys' at 3:15(Ex.247p.1048). Bradley's concluding comments to the jury returned to Barton

having answered Pickering's call to Gladys at 3:15 as proof of Barton having committed this offense during its 3:00-4:00 timeline(Ex.247p.1055).

Counsel's Testimony

Bruns testified any reason for not cross-examining Selvidge about prior inconsistent testimony regarding the timing and length of her last call with Gladys was premised on Selvidge was a very emotional witness who they wanted off the stand quickly(29.15Tr.535-36).

Findings

The findings rejected this claim because Selvidge's prior testimony also included that she gave generalized testimony she was uncertain when she spoke to Gladys(29.15L.F.1020-21). The fourth trial is referenced for the cross-examination that was alleged should've been done happened there and didn't impact Selvidge's credibility(29.15L.F.1020-21).

Counsel Was Ineffective

Taking Bradley's argument, based on Pickering's testimony, that Barton answered Gladys' phone at 3:15 as true (Ex.247p.1048,1055), Pickering's call must have preceded Selvidge's calling Gladys under Selvidge's previous testimony that she spoke to Gladys **after 3:00** and she did so for **20-25 minutes**(Ex.242p.519-23;Ex.244p.472-78). That must be the case because if Selvidge called at 3:00 and talked to Gladys 20-25 minutes, then it would have been impossible for Pickering's call to have gotten through at 3:15 because Gladys' line would have been busy. The consequence of Pickering's call preceding Selvidge's call is that if Selvidge called at

3:15, immediately after Pickering's call ended, then her conversation with Gladys did not end until 3:35-3:40. Thus, Barton would have had only 20-25 minutes to do all the acts alleged.

When this Court reversed for limiting closing argument, it did so because the prohibited argument went to disproving respondent's 3:00-4:00 timeline. *State v. Barton*,936S.W.2d781,782-85(Mo.banc1996). The intended argument was critical because it posited for the jury Barton had too little time to commit all the alleged acts and clean himself up before returning to Horton's. *Id.*785. Under Selvidge's fifth trial's testimony that she last talked to Gladys at 2:30 (Ex.247p.505), respondent's 3:00-4:00 timeline appeared more plausible since Gladys would not have had to been alive until at least 3:35-3:40.

The same too little time rationale applies now. Reasonable counsel would've cross-examined Selvidge with her prior testimony to establish there was too little time, 20-25 minutes, for Barton to have committed this offense. *See Black*. It was not a reasonable strategy to fail to cross-examine Selvidge about the centerpiece of respondent's case, its 3:00-4:00 timeline, just to get her off the stand quickly. *See Butler* and *McCarter*. Barton was prejudiced because had counsel highlighted Selvidge's prior testimony, the implausibility of Barton committing the crime and being back at Horton's in 20-25 minutes under respondent's 3:00-4:00 timeline would've been shown. *See Strickland* and *State v. Barton*,936S.W.2d at 785.

The findings' reliance on the fourth trial's questioning of Selvidge is misplaced because that jury heard Allen's testimony before she was exposed as a liar and heard Arnold's false perjured testimony.

A new trial is required.

V.

FAILURE TO CALL HAMPTON

The motion court clearly erred denying counsel was ineffective for failing to call Michelle Hampton to testify she saw Barton repairing Horton's deck between 4:00-4:20 because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Hampton to testify about seeing Barton at 4:00-4:20 and Barton was prejudiced as Hampton's testimony called into question respondent's 3:00-4:00 crime theory timeline such that the jury would have acquitted Barton.

Michelle Hampton could've testified she saw Barton repairing Horton's deck at 4:00-4:20. This evidence would've supported Barton couldn't have committed this offense under respondent's 3:00-4:00 timeline.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). For strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*, 108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994).

Amended Motion

Barton alleged counsel was ineffective for failing to call Hampton to testify she saw Barton repairing Horton's deck at 4:00(29.15L.F.110,248). The pleadings added Hampton could also testify she didn't see blood on Barton(29.15L.F.110,248). The

evidence available from Hampton would've allowed the jury to infer Barton wasn't responsible(29.15L.F.110,248).

Findings

Barton's working on Horton's deck wasn't new or unknown as Horton testified to the same during Horton's 1992 deposition(29.15L.F.980). Horton testified to the same information in "previous trials"(29.15L.F.980 relying on "2006 Trial Tr.464"). Not calling Hampton was strategic(29.15L.F.980). The failure to ask Hampton at the 29.15 if she saw blood on Barton, the alleged ineffectiveness grounds as to her, constitutes reasons for denying relief(29.15L.F.980-81).

Counsels' Testimony

Bruns was aware in a prior trial Michelle Hampton testified she saw Barton repairing Horton's deck between 4:00 and 4:20(29.15Tr.529-30). Bruns had no strategy reason for not calling Hampton(29.15Tr.529-30). Bruns testified their strategy was Barton couldn't have committed this crime because whoever did it must've been blood covered because the scene was so bloody which was inconsistent with the tiny amount of blood on Barton(29.15Tr.558-59).

Kessler didn't know who Hampton was(29.15Tr.466).

Michelle Hampton's Testimony

Hampton saw Barton repairing Horton's deck about 4:00-4:20(29.15Tr.84). Hampton had testified at the fourth April, 1998, trial to seeing Barton then(29.15Tr.82;SeeEx.244p.797-98).

Counsel Was Ineffective

Counsel's duty is to call witnesses who corroborate the defense theory. *Foster v. State*,502S.W.2d436,438(Mo.App.,St.L.D.1973). Hampton would've corroborated Barton's defense he couldn't have committed the offense between 3:00-4:00 because she saw Barton at 4:00-4:20 working on Horton's deck. Reasonable counsel would've called Hampton because she corroborated Barton's defense and refuted respondent's timeline. *See Strickland* and *Foster*. Barton was prejudiced because his presence working outside at Horton's at 4:00-4:20 called into question respondent's 3:00-4:00 timeline such that the jury would've acquitted Barton. *See Strickland*. The failure to call Hampton wasn't reasonable strategy; Bruns testified he had no strategic reason for failing to call her(29.15Tr.529-30). *See*, *Butler* and *McCarter*.

The crux of this claim was Hampton could've refuted respondent's timeline by testifying she saw Barton at 4:00-4:20(29.15L.F.110,248). While Hampton's testimony didn't expressly include she didn't see blood on Barton, the jury would've inferred Barton's being outside and visible to others, while working on Horton's deck, meant he wasn't blood covered under Bruns' theory that whoever committed this offense was so covered(29.15Tr.558-59). That is in keeping with Horton's trial testimony Barton was living in his car(Ex.247p.457) and Barton's consent to his car being searched and respondent not presenting evidence of any recovered blood covered clothing(Ex.247p.683). Thus, reasonable counsel would've called Hampton and Barton was prejudiced. *See Strickland*.

The finding Horton testified to the same information in "previous trials," while citing the last 2006 trial transcript,(29.15L.F.980 relying on "2006 Trial Tr.464")

doesn't address this claim. Horton's prior and "2006" testimony placed Barton as repairing Horton's deck at 4:30-5:00 (Ex.241p.12;Ex.242p.445;Ex.244p.385;Ex.247p.464-65). Unlike Horton, Hampton placed Barton at Horton's at 4:00-4:20 - during respondent's 3:00-4:00 timeline.

The prejudice of respondent's failure to disclose the Horton notes (Point III) coupled with counsel's failure to call Hampton and impeach Selvidge on her last call's timing (Point IV) serves to underscore the jury didn't get an accurate understanding of how respondent's timeline doesn't stand-up, and thus, the jury's verdict was unreliable.

A new trial is required.

VI.

NO BLOOD SPATTER EXPERT

The motion court clearly erred denying counsel was ineffective for failing to call a blood spatter expert, like Stuart James, because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel knowing they had to explain Barton got Gladys' blood on him through transfer contact and that Newhouse testified at the fourth trial Barton's clothes had high velocity blood spatter would have conducted a thorough investigation and presented a spatter expert to explain Newhouse was wrong and not conducted a cross-examination Judge Dandurand shut down on his own motion as inappropriate and wasting time. Barton was prejudiced because the jury never heard why Newhouse was wrong and blood on Barton's clothing was transfer.

Counsel failed to present blood spatter expert evidence that would've refuted Newhouse's claim blood on Barton's clothes was caused by spatter, rather than transfer, when Barton pulled Selvidge away from Gladys. Instead, counsel engaged in a cross-examination of Newhouse that Judge Dandurand shut down **on his own motion** as inappropriate and wasting time.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984).

A. Fourth Trial

Respondent called William Newhouse to testify blood on Barton's clothing was high velocity spatter and not inadvertent transfer(Ex.244p.704-25).

Defense counsel called in guilt Gene Gietzen as an intended blood stain/spatter expert(Ex.244p.843,852,879-80). Ahsens and the court voir dired Gietzen on his qualifications and the court ruled Gietzen was unqualified(Ex.244p.848-50,855-79). Despite that ruling, there was an agreement Gietzen could give limited testimony(Ex.244p.879-80). Gietzen testified there was a significant quantity of blood on and around Gladys' body(Ex.244p.882-83). There was little room between where blood was found and Gladys' body(Ex.244p.883). The assailant had to have been particularly close to Gladys(Ex.244p.885). The amount of blood on Barton's clothing was less than expected taking into account the scene's compactness and number of stab wounds(Ex.244p.885).

In Ahsens' initial guilt closing argument, he argued Barton's shirt contained high speed blood spatter and not contact transfer caused by Barton pulling Gladys' granddaughter, Selvidge, away from Gladys(Ex.244p.896-98). Ahsens argued forensic evidence against Barton was "overwhelming"(Ex.244p.902).

Defense counsel argued there was transfer, not spatter(Ex.244p.914).

In rebuttal guilt argument, Orr argued Newhouse established blood on Barton's shirt was high impact spatter(Ex.244p.927).

B. Fifth Trial

On fifth trial direct, Newhouse identified blood spatter "learned treatise[s]" referencing authors' names because he couldn't remember titles(Ex.247p.876).

Newhouse identified "Terry and Bart" and "**Stuart** - - well, another example is the name of McDonald that has published a book" as those having authored "learned treatises"(Ex.247p.876)(emphasis added).

Newhouse testified two stains on Barton's jeans and small stains on Barton's shirt were high impact spatter, not inadvertent contact(Ex.247p.866-68,885-87,891).

Cross-examination of Newhouse included:

Q. If something on a car might be **paint** or it might be **manure**, you can't say which one it is, only that it is consistent with **paint** or consistent with **manure**. Doesn't mean it's one or the other if it's just consistent with one of them; correct?

A. **I wouldn't even attempt to describe that particular circumstance in that way.**

(Ex.247p.907)(emphasis added). When Kessler stated blood spatter analysis is "not a science" Newhouse countered that was "not true"(Ex.247p.908).

Dandurand interrupted Kessler's Newhouse cross-examination stating:

THE COURT: Just a couple of observations I am going to make. First of all, for the last 20 minutes, this has been argument and not cross-examination. It's totally argumentative. You continue to ask this witness and others about experiments that were not done, which is not permissible. Although it has not been objected to, I have allowed it because it has not been objected to. I want to suggest that it is within my discretion that I can tell you when it is time to wrap up this examination, and if you want to ask him about

things, that's okay. It's time to stop arguing at this time with the witness. It's argumentative. Ask him questions if you have questions about his testimony.

This is just argument.

(Ex.247p.911-12)(emphasis added).

On recross, Kessler asked Newhouse whether space programs follow verifiable physics laws and Newhouse acknowledged they did(Ex.247p.918-19). That was followed by:

Q. Okay. You don't have any of that in this case?

A. I didn't apply any of the principles of NASA.

Q. Or really any principles of **Deputy Dog**?

MR. BRADLEY: Objection, Your Honor.

THE COURT: **Sustained**.

(Ex.247p.919)(emphasis added).

C. Guilt Arguments

Respondent emphasized in original and rebuttal argument Newhouse found blood on Barton's clothing that was impact spatter, not inadvertent transfer contact with Selvidge(Ex.247p.1022-24,1048-52).

Kessler argued blood on Barton's clothes was caused by inadvertent transfer contact with Selvidge, not impact spatter(Ex.247p.1030-34,1036-38,1041). Kessler attacked Newhouse as not "even junk science" whose findings were devoid of "a scientific method"(Ex.247p.1037-39,1043). Kessler mocked Newhouse's credentials

because he was a Purdue University Boilermaker engineering graduate and for Purdue being known for agricultural programs(Ex.247p.1038). [10]

D. 29.15 Evidence

1. Stuart James

Stuart James is a forensic consultant specializing in bloodstain pattern analysis(29.15Tr.186). James was a charter member of the International Association of Bloodstain Pattern Analysts and now a distinguished member(29.15Tr.188). James co-authored a multiple edition text *Principles of Bloodstain Pattern Analysis*(Ex.302;29.15Tr.191-92). James is *The Journal of Bloodstain Pattern Analysis* editor(29.15Tr.191). James' bloodstain training included attending "Herbert Leon MacDonell" seminars and MacDonell's college course(29.15Tr.189-90). When James was a crime lab supervisor, he testified exclusively for the prosecution(29.15Tr.194).

James reviewed Newhouse's findings, Gietzen's fourth trial testimony, and examined Barton's clothing(29.15Tr.213,215,220-21).

[10] Purdue tied for ninth with Cornell in 2012 engineering rankings and tied for tenth with Princeton and the University of Texas in 2013. *See* https://engineering.purdue.edu/Engr/AboutUs/News/Announcements/college-at-10th-in-new-national-rankings. (Visited 10/19/13). Purdue ranks first in Agricultural and Biological Engineering. *Id.*

James identified spots on Barton's shirt as transfer contact and not high velocity blood spatter(29.15Tr.220-21). James concluded the few blood stains on Barton's shirt didn't support they were impact spatter because the quantity didn't constitute a spatter pattern(29.15Tr.228-29,257-58). To constitute "a pattern" standards require 15-20 stains, and even though he didn't recall the exact number on Barton's clothing there wasn't that many(29.15Tr.239-40). James testified the small amount of blood on Barton's shirt could've been deposited by means other than high velocity blood spatter(29.15Tr.232-33). Newhouse's opinions were incorrect to a reasonable degree of scientific certainty under standards spatter experts followed(29.15Tr.258-59). James indicated the blood stains on Barton's clothing could be explainable as blood transfer if Selvidge had contact with wet blood(Ex.229p.5).

2. Lawrence Renner

Forensic consultant Lawrence Renner resides in Santa Fe, New Mexico(29.15Tr.385-86;Ex.303). Renner was a 2005 Life in the Balance training presenter(Ex.303p.4;29.15Tr.389).

Renner may have talked to someone about Barton's case, but he wasn't provided materials to review(29.15Tr.388-89). Renner has never rendered an opinion on blood spatter based on materials shown him at a conference(29.15Tr.389-90). To formulate spatter opinions Renner has to review photos using special lenses and he didn't take his lenses to Life In the Balance(29.15Tr.390). Renner only provides opinions after he's talked with counsel for about one hour, obtained a package of

crime photos/videos, and obtained a second all case documents package(29.15Tr.388-89). Renner never has advised an attorney, based on informal training discussions, that any further blood spatter investigation was unwarranted(29.15Tr.391-92). Before Renner is able to render a case opinion he must've devoted at least thirty hours to it(29.15Tr.392-93).

Renner has never worked on a Missouri case with Freter/Bruns/Kessler(29.15Tr.387-88,390). It was possible during a Life In The Balance break Barton's attorneys spoke with him(29.15Tr.392).

E. Counsels' 29.15 Testimony

1. Freter

Freter is an attorney, but was hired for paralegal file organization(29.15Tr.396-97). Bruns and Kessler were hired as attorneys(29.15Tr.396-97). Freter was free to express opinions, but Bruns and Kessler made strategy decisions(29.15Tr.397).

Freter decided it wasn't desirable to hire a spatter expert(29.15Tr.403-04,407). Freter's decision was based upon reviewing Newhouse's report and prior testimony that there was three types of bloodstains on Barton's clothing(29.15Tr.408-11). Freter concluded that information was inconsistent with Barton's reporting of how Gladys' blood got on him(29.15Tr.408). Freter was "happy" with respondent talking only about high velocity spatter because that didn't include "three different kinds of stains"(29.15Tr.409-10). Freter was afraid if they had their own spatter expert that expert would have to address three different types of stains(29.15Tr.411).

Freter testified she made her decision based upon having had discussions with a New Mexico man at Life In the Balance while she brought Barton's case to work on there(29.15Tr.411-12). The New Mexico man spoke with Freter about the three different types of stains and he raised that issue(29.15Tr.412,415-16). That man didn't look at pictures with special lenses and didn't view the crime scene video(29.15Tr.417).

Freter also stated a spatter expert was unnecessary because such an expert couldn't shed any light on their theory that if Barton did the offense he'd be blood covered(29.15Tr.409). Freter didn't consider blood spatter "scientific"(29.15Tr.409). A decision was made to just cross-examine Newhouse(29.15Tr.424).

2. Kessler

Kessler didn't consider it a problem respondent was going to present high velocity spatter evidence(29.15Tr.455). What Kessler thought was problematic was Barton had blood in more than one location on his clothing(29.15Tr.455-56). Kessler was concerned getting their own expert could confirm Newhouse's view(29.15Tr.456-58,477). A spatter expert wasn't called because of Freter's Life In The Balance efforts(29.15Tr.452-55). Kessler thought it'd be enough to cross-examine Newhouse "fairly hard"(29.15Tr.457-58).

Kessler's theory was Barton got blood on him through accidental crime scene contact pulling on Selvidge(29.15Tr.459,487-88).

3. Bruns

Bruns testified Freter talked to a spatter expert at Life In The Balance and didn't get any helpful information(29.15Tr.526-27,542). Kessler was responsible for how Newhouse was cross-examined(29.15Tr.542). Their defense theory was Barton couldn't have committed the offense when he had so little blood on him when the crime scene was so bloody(29.15Tr.558-59).

F. Findings

James is a professional expert who, since 1981, has done 75% of his evaluations for defendants(29.15L.F.990). James didn't test to determine if Newhouse's testing was accurate(29.15L.F.991,1025). Barton presented no evidence Newhouse was incorrect(29.15L.F.991).

James testified that in deciding whether blood spatter was present the number of spatters is a factor to consider, but couldn't testify how many spots were visible(29.15L.F.992).

Counsel exposed Newhouse's opinions' limitations(29.15L.F.992). Counsel made the reasonable decision not to call their own expert whose limitations would be exposed(29.15L.F.992-93).

Freter and Bruns had a discussion with Renner and showed Renner Barton's materials at Life In The Balance(29.15L.F.998). From discussions with Renner it was determined there was a problem with three different types of stains that couldn't be explained and counsel made the strategic decision not to challenge Gladys' blood was on Barton(29.15L.F.998-99,1024). Renner didn't deny he may have spoken to counsel at Life In The Balance(29.15L.F.997-98).

Kessler confirmed Freter's viewpoint(29.15L.F.998-99).

Counsel made the reasonable strategic decision not to hire an expert and avoided discussion of three types of blood "transfers" on Barton's clothing(29.15L.F.998-99,1024-25). Counsel made the decision to attack Newhouse's opinion as "junk science" after investigation(29.15L.F.1024-25).

G. Counsel Was Ineffective

Failing to interview witnesses relates to preparation, not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Lack of diligent investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

Counsel conducted a cursory, not diligent, investigation speaking to Renner at a training seminar and reviewing Newhouse's report in deciding not to pursue spatter evidence further(Tr.29.15Tr.408,411-12). *See, Kenley*. There wasn't diligent investigation. Renner never was provided Barton materials to review and he has never rendered a spatter opinion for anyone at a training conference because he doesn't take his lenses there and must spend thirty hours reviewing assorted case materials before rendering opinions(29.15Tr.389-93). *See Kenley*.

Freter's reason for not getting a spatter expert was there was "three different kinds of stains"(29.15Tr.408-11) and Kessler's was that there was more than one spot on Barton's clothing(29.15Tr.409-10). Their explanation isn't objectively reasonable.

See McCarter and *Butler*. Counsel knew that Newhouse's fourth trial testimony wasn't directed at the kinds or numbers of stains, but rather that the blood on Barton's clothing was high velocity spatter, and not inadvertent transfer, intended to counter Barton's explanation to police that he got Gladys' blood on him while pulling Selvidge away from Gladys(Ex.244p.704-25). Further, their failure to diligently pursue spatter expert testimony was unreasonable because respondent's fourth trial's initial and rebuttal closing arguments hammered home Newhouse's opinion(Ex.244p.896-98,927). *See McCarter* and *Butler*. Moreover, counsel's unreasonableness is underscored by fourth trial counsel having tried to call Gietzen, who was found unqualified, to rebut Newhouse(Ex.244p.843,848-50,852,855-80), and fourth trial counsel's closing argument the stains on Barton were transfer and not spatter, despite Gietzen's exclusion(Ex.244p.914). *See McCarter* and *Butler*.

Additionally, counsel was unreasonable because Kessler argued to the jury, without evidentiary basis that blood on Barton was transfer contact with Selvidge, yet all the evidence the jury heard came from Newhouse that it was spatter(Ex.247p.1030-34,1036-38,1041). *See McCarter* and *Butler*. Kessler did the same as fourth trial counsel (Ex.244p.914) he argued transfer contact without any evidentiary support. At least fourth trial counsel had attempted to present contact transfer evidence to support their closing argument and didn't only because Gietzen was ruled unqualified(Ex.244p.848-50,855-79).

This Court has long recognized the relevance and admissibility of blood spatter evidence. *See,e.g., State v. Sandles*,740S.W.2d169,177(Mo.banc1987)(photos

properly admitted to show spatter). This Court rejected the direct appeal argument Newhouse's testimony should've been excluded on the grounds he was unqualified and failed to follow accepted scientific methods. *Barton*,240S.W.2d at 704. In rejecting this claim this Court deemed the arguments "frivolous" and quoted from respondent's brief Newhouse's credentials which included his **Purdue engineering degree** that Kessler mocked. *Id.*704-05. It was unreasonable to attack Newhouse and spatter as "junk science." *See Sandles* and *Barton's* fifth trial direct appeal opinion. The unreasonableness of that strategy is strikingly apparent because Judge Dandurand shut down, on his own motion, Kessler's patently inappropriate cross-examination (Ex.247p.911-12), and when Kessler persisted in his personally insulting "Deputy Dog" questioning, sustained respondent's objection(Ex.247p.919).

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court concluded counsel was ineffective for failing to do a thorough, comprehensive expert presentation. This Court indicated, when assessing reasonableness of attorney investigation, a court is required to consider not only the quantum of evidence already known, but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.*305. Hutchison's counsel was ineffective in limiting the scope of investigation. *Id.*at 307-08. Even assuming Freter talked to Renner at Life In The Balance during breaks (29.15Tr.392), Renner testified he couldn't have rendered any opinions because it takes him at least thirty hours of work that requires he review materials that includes examinations with lenses he doesn't bring to conferences(29.15Tr.387-93). Freter acknowledged Renner didn't look at pictures

with special lenses(29.15Tr.417). Moreover, Renner never has offered an opinion based on materials shown him at a conference(29.15Tr.387-93). This investigation was unreasonable.

To prevail on a claim of ineffective assistance for failing to retain expert testimony, a movant is required to show such expert existed at the time of trial, the expert could've been located through reasonable investigation, and the expert would've benefited the defense. *Tisius v. State*,183S.W.3d207,213-14(Mo.banc2006). James was available and could've been located through reasonable investigation because he was a charter member of the International Association of Bloodstain Pattern Analysts and now a distinguished member of that group as well as its Journal's editor(29.15Tr.188,191). *See Tisius*. James' stature in the blood spatter community and Newhouse's "not true" rebuff of Kessler's statement that spatter is "not a science," demonstrated the unreasonableness of Kessler's "junk science" approach(Ex.247p.908). Since Kessler's case theory was Barton got blood on him through contact(29.15Tr.487-88), it was unreasonable not to call an expert to counter Newhouse's spatter opinion. *See Hutchison* and *Strickland*.

Stuart James would've significantly advanced Barton's defense as he has co-authored a text *Principles of Bloodstain Pattern Analysis* for which there has been multiple editions(Ex.302;29.15Tr.191-92). Newhouse testified one of the "learned treatises" he relied on in formulating his conclusions was "**Stuart**"(Ex.247p.876). It would've been highly persuasive for a jury to hear that while Newhouse claimed to rely on Stuart James' learned treatise, James' own opinion was that Newhouse's

opinions were incorrect to a reasonable degree of scientific certainty under the science's standards(29.15Tr.258-59). Moreover, James' opinion was the blood on Barton could've been caused by contact transfer with Selvidge(Ex.229p.5). *See Tisius*. James would've given counsel an **evidentiary** basis to argue blood on Barton was transfer, and not spatter, which was lacking from Kessler's repeated argument merely vouching it was transfer(Ex.247p.1030-34,1036-38,1041). *See Tisius*.

Newhouse recognized "McDonald" as a "learned treatise" he relied on(Ex.247p.876). James' training included attending "MacDonell's" college course and his seminars(29.15Tr.189-90). That Newsome and James relied on the same authority "McDonald"/"MacDonell" for rendering vastly different opinions taken together with James' findings reasonably could've swayed the jury to believe blood on Barton was transfer from him pulling Selvidge from Gladys' body.

Reasonable counsel would've done more investigation than casual seminar training conversation with Renner. *See Hutchison* and *Strickland*. Reasonable counsel would've recognized from Newhouse's fourth trial testimony (Ex.244p.704-25), the exclusion of Gietzen (Ex.244p.848-50,855-79), and the fourth trial's competing argument contesting whether the blood was transfer or spatter (Ex.244p.896-98,902,914,927), it was critical to present expert testimony blood on Barton was transfer, not spatter. *See Strickland* and *Hutchison.*

Barton was prejudiced because James could've shown Newhouse's opinion was wrong and that Barton had transfer(29.15Tr.258-59;Ex.229p.5) which provided evidentiary support for closing argument it was transfer and not mere vouching it was

transfer(Ex.247p.1030-34,1036-38,1041). There is a reasonable probability Barton wouldn't have been convicted. *See Strickland* and *Tisius*.

A new trial is required.

VII.

FAILURE TO IMPEACH HORTON - BARTON'S HANDWASHING/BROKEN DOWN CAR AND DEMEANOR

The motion court clearly erred denying counsel was ineffective for failing to cross-examine Horton about prior inconsistent statements about how long Barton washed his hands, prior knowledge of Barton's car problems, and whether Barton displayed changed demeanor from earlier and the hand-washing time because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have questioned Horton about her prior inconsistent statements and Barton was prejudiced because respondent relied on Barton taking a long time to hand-wash as evidence he was removing blood, which could be attributed to him working on his car, and an alleged altered demeanor as evidence of guilt and Horton's inconsistencies would have cast significant doubt on respondent's version of events.

Horton has given inconsistent testimony about how long Barton washed his hands, her knowledge of his car problems, and Barton having a change in demeanor over the afternoon. Respondent relied on the length of time of Barton's hand-washing and change in demeanor as guilt evidence. Questioning Horton about all her prior inconsistencies would've seriously called into question respondent's assertions.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). For strategy to be a proper basis to deny relief,

the strategy must be reasonable. *Butler v. State*, 108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994).

Horton's Fifth Trial Testimony

Horton testified Barton was at her trailer from approximately noon to 2:00 p.m. and was relaxed(Ex.247p.452-53,456). At 2:00, Barton went to Gladys' to borrow $20.00(Ex.247p.452-53,456-57). Barton returned to Horton's at 2:15 and there until 3:00(Ex.247p.457-58).

Horton testified that at 3:00 Barton went back to Gladys' and returned to Horton's at 4:00(Ex.247p.458-59). When Barton returned at 4:00 to Horton's, following his second trip to Gladys,' he spent ten minutes in her bathroom(Ex.247p.458-61). Because of how long Barton was in her bathroom Horton walked down there and when Barton saw her that he said he was washing his hands because he'd been working on his car(Ex.247p.459-60). Barton seemed harried, no longer relaxed(Ex.247p.460-61). Horton testified she wasn't previously aware of Barton having car problems(Ex.247p.456-57).

Horton's Prior Statements/Testimony

On October 10, 1991, (the day after the homicide) Horton told Officer Martin that at noon, on the day in question, Barton told her that his car was broken and he

asked Horton to give him a ride to it, but she couldn't because her child was sick(Ex.9 from SC83615 Martin Statement at 41-42).[11]

On October 14, 1991, Horton again told Martin that Barton had reported to her that his car wasn't working(Ex.10 from SC83615 Martin Statement at 45,65).

At the preliminary hearing, Horton testified Barton was in her bathroom 4-5 minutes(Ex.238p.16-17). Horton testified when she went back there Barton was washing his hands and Barton stated he'd been working on a car(Ex.238p.16-17).

At the third trial, Horton testified when she went to check on Barton in the bathroom, he was washing his hands and there was nothing unusual(Ex.242p.476). Barton wasn't trying to clean off his clothing or anything other than his hands(Ex.242p.476).

At the third trial, Horton testified that after Barton's second trip to Gladys,' and when Horton was starting to leave to go check on Gladys, Barton displayed a "calm" demeanor when he discouraged Horton from going to Gladys' because Gladys was napping(Ex.242p.443-44).

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[11] Horton's Statements to Officer Martin were Exhibits 9 and 10 in the 29.15 before Judge Scott which was SC83615(Ex.245 Exhibit Index). Horton's Statements to Officer Martin were Exhibits 15 and 16 at the 29.15 remand before Judge Sims(Ex.246 Exhibit Index). At this 29.15, judicial notice of the prior case records was taken(29.15Tr.52-53).

At the fourth trial, Horton testified Barton had told her that he was having car problems(Ex.244p.417-18).

Respondent's Closing

Cleek's initial guilt argument, told the jury Barton's guilt was demonstrated by Barton "immediately" going into Horton's bathroom to wash his hands where he spent "a long period of time cleaning up"(Ex.247p.1020).

In Bradley's rebuttal argument, the jury was told Barton's guilt was demonstrated by his "mood changed" during the day(Ex.247p.1052). That mood changed from "happy-go-lucky" which included "kidding around" and "[a]lmost dancing" to "somber" after his second trip to Gladys'(Ex.247p.1052).

Findings

Barton didn't present any evidence to establish the failure to impeach Horton with prior inconsistencies wasn't strategic and he wasn't prejudiced(29.15L.F.1021). The passage of time explains reasonable minor details being forgotten or remembered differently(29.15L.F.1021). Counsels' strategy was to focus on important details, not all discrepancies(29.15L.F.1021-22).

Counsels' Testimony

Kessler testified that because Bruns cross-examined Horton that Bruns was responsible for deciding impeachment areas(29.15Tr.452;Ex.247p.495).

Bruns testified he didn't remember how he gauged cross-examination of Horton(29.15Tr.526). Bruns didn't recall anything significant about Horton having testified that Barton was in her bathroom washing his hands for ten

minutes(29.15Tr.527-28). Bruns didn't recognize the significance between Horton's fifth trial testimony Barton was washing his hands for ten minutes versus her prior testimony(29.15Tr.527-29,539). Bruns didn't recognize the significance of Horton changing her testimony in the fifth trial about Barton's demeanor(29.15Tr.539-41).

Counsel Was Ineffective

Counsel is ineffective when they fail to impeach a critical witness. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996). A trial court has no authority to prevent impeachment of state's witnesses on matters related to a "paramount issue" because such issue by definition isn't collateral. *Black*,151S.W.3d at 55-56,58.

Respondent argued Barton's "immediately" going to Horton's bathroom to wash his hands for "a long period of time" (Ex.247p.1020) was evidence of guilt; this made it a "paramount issue," not collateral. *See Black*. Respondent used lengthy hand-washing to explain why so little blood was found on Barton because police had seized Horton's soap and hand towels and no blood was found(Ex.247p.687). Reasonable counsel would've impeached Horton's fifth trial testimony Barton was in her bathroom for ten minutes washing his hands and Horton was unaware of Barton's car problems(Ex.247p.456-61) with (a) her preliminary hearing testimony Barton was washing 4-5 minutes and Barton had explained to Horton he'd been working on a car (Ex.238p.16-17); (b) her third trial testimony that there was nothing unusual about Barton's hand-washing and that Barton was only washing his hands and not his clothing (Ex.242p.476), (c) her two statements to Officer Martin that Barton had told

her his car was broken down (Exs.9 and 10 from SC83615 Martin Statements at 41-42,45,65); and (d) Horton's fourth trial testimony Barton had told her he was having car problems(Ex.244p.417-18). Had counsel used Horton's prior statements, the jury would've learned there was great disparity between ten minutes versus four to five, and that Horton was unable to accurately report how long Barton was hand-washing.

Further, no matter how many minutes Barton was hand-washing, there was a reasonable explanation - he'd been working on his car. Reasonable counsel would've questioned Horton about her prior inconsistent statements about how long Barton was hand-washing and Barton having told her that his car was broken. *See Black* and *Strickland*.

A change in a defendant's demeanor has been recognized as demonstrating consciousness of guilt. *State v. Hutchison*,957S.W.2d757,763(Mo.banc1997). Respondent argued Barton's guilt was demonstrated by his changed demeanor from "happy-go-lucky" to "somber" after his second trip to Gladys'(Ex.247p.1052). Respondent presented Barton's purported demeanor change as consciousness of guilt, and therefore, it was a "paramount issue." *See Hutchison* and *Black*. Horton testified in this fifth trial that early in the day Barton displayed a relaxed demeanor(Ex.247p.452-53,456), but following his second trip to Gladys' he was harried(Ex.247p.460-61). At the third trial, Horton testified after Barton's second trip to Gladys' he displayed a "calm" demeanor(Ex.242p.443-44). Reasonable counsel would've impeached Horton with how she'd changed her testimony about Barton's demeanor. *See Black* and *Strickland*.

Bruns' inability to recognize the importance to respondent's case of Barton's hand-washing and alleged demeanor change (29.15Tr.527-29,538-41) establish Bruns didn't act reasonably. *See Black*, *Strickland*, *Butler*, and *McCarter*.

Barton was prejudiced by counsel's failure to impeach Horton with her prior statements involving how long Barton hand-washed and her prior knowledge Barton was working on his car. *See Strickland* and *Black*. Impeaching Horton on how long Barton was washing was critical to countering respondent's claim he took so long because he was washing blood off. Further, failing to impeach Horton about her knowledge Barton had reported he was washing because he was working on his car would've explained why he was washing at all and if he took particularly long, why it would take that long - because a car was involved. *See Black* and *Strickland*.

Moreover, Barton was prejudiced by counsels' failure to impeach Horton as to her reporting Barton had displayed a changed demeanor from early in the day versus after returning the second time from Gladys' because respondent portrayed that change as consciousness of guilt. *See Strickland* and *Black.*

A new trial is required because counsel failed to impeach Horton on issues shown to be paramount through how respondent used them in closing argument.

VIII.

ARGUMENT CONTRADICTING WHAT SELVIDGE TOLD OFFICER ISRINGHAUSEN

The motion court clearly erred denying counsel was ineffective for failing to object to Bradley's guilt closing argument that Selvidge told Officer Isringhausen Barton did not pull her away from Gladys and Gladys' bedroom which expressly contradicted Isringhausen's direct testimony because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to this misrepresentation and Barton was prejudiced because Barton's defense was built around establishing the small amount of blood on his clothing was transfer from Barton pulling Selvidge away and Bradley's argument repudiated that explanation.

Bradley argued Selvidge didn't tell Officer Isringhausen Barton pulled her away from Gladys' body and bedroom. This argument expressly contradicted what Bradley elicited from Isringhausen.

The argument was prejudicial and should've been objected to because the centerpiece for explaining how Barton had small inadvertent blood transfer on him was from pulling Selvidge away from Gladys' body and bedroom. Bradley's argument presented Selvidge as having corrected her "confused" reporting to Officer Hodges that Barton had in fact pulled her away and repudiated Barton's explanation for blood on him.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). For strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*, 108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994).

Trial Evidence And Argument

Horton testified that when Selvidge reached down to touch Gladys, Horton told her not to and Selvidge didn't touch anything(Ex.247p.478-79).

Selvidge testified Barton never grabbed her and never pulled her out of Gladys' bedroom(Ex.247p.518). Selvidge acknowledged the night Gladys' body was discovered she told Officer Hodges she knelt by Gladys' body to see if she was alive(Ex.247p.522-23). Selvidge denied she had previously reported Barton reached around her to pull her away from Gladys' body, but then said she was under significant stress, and therefore, might've erroneously told Officer Hodges that(Ex.247p.523,526).

Officer Hodges testified Barton told Hodges he got blood on himself when he pulled Selvidge away from Gladys(Ex.247p.550-51). Barton told Hodges he thought he got the blood on himself because he slipped when he pulled Selvidge away from Gladys and his slipping was caused by stepping in blood(Ex.247p.555-56).

Officer Hodges testified Selvidge told him Barton reached around her and pulled her away from Gladys' body while Horton was present(Ex.247p.542-45,549).

Selvidge thereby confirmed for Hodges what Barton reported that he pulled Selvidge away from Gladys(Ex.247p.551-52).

Officer Merritt testified Barton told Officer Hodges he got blood on himself when he was pulling Selvidge away from Gladys' body(Ex.247p.672,683).

Bradley's questioning of Isringhausen elicited Selvidge told Isringhausen that she didn't get past Gladys' body and Barton pulled Selvidge from the bedroom(Ex.247p.747).

Kessler argued Barton told the police he pulled Selvidge away from Gladys' body and he slipped getting blood on him(Ex.247p.1030). Kessler argued the police, after talking to Barton, confirmed with Selvidge that Barton's reporting was accurate(Ex.247p.1030).

Bradley's rebuttal closing argument included:

> Now, the one witness, Debbie - Carol Selvidge {sic} got **confused**. She did tell Hodges the night of the murder when she's upset that her grandmother had just been murdered that, yeah, that's probably what happened. The next day, she told Corporal Isringhausen at the time, no, **he never pulled me back**. He got blood on himself and didn't know he had it, and then he is trying to cover for it.

(Ex.247p.1050)(sic in original)(emphasis added).

Counsel's Testimony

Kessler didn't know whether there was a strategy in failing to object to Bradley's argument, but acknowledged an appropriate objection would've been Bradley misstated the evidence(29.15Tr.447-49).

Findings

Counsel didn't object Selvidge told Isringhausen that Barton merely pulled her back "from the room"(29.15L.F.989-90,1030)(relying on Ex.247p.747). The "real issue" was whether Barton got Gladys' blood on his clothes when he reached down and pulled Selvidge from Gladys as Barton told the police(29.15L.F.1007)(relying on Ex.247p.672). The issue wasn't whether Barton pulled Selvidge from the room, but whether Barton pulled Selvidge from Gladys(29.15L.F.1007).

Bradley's argument was proper(29.15L.F.1007). The jury understood Bradley was arguing Selvidge had told Isringhausen that Barton hadn't moved Selvidge back from Gladys' body(29.15L.F.989-90,1007-08,1030).

Counsel Was Ineffective

Counsel's failure to make timely proper objections to arguments can constitute ineffective assistance. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(failing to object to penalty arguments).

Crucial to Barton's defense was Officer Hodges testimony that Barton told Hodges that he got blood on himself **while he pulled Selvidge away** from Gladys' body and bedroom (Ex.247p.555-56) and Officer Merritt recounted what Barton had reported to Hodges on this subject(Ex.247p.672,683). Bradley's Isringhausen questioning elicited Selvidge told Isringhausen that she didn't get past Gladys' body

and Barton pulled Selvidge from the bedroom(Ex.247p.747). Bradley argued exactly the opposite that Selvidge was "confused" when she told Hodges that Barton pulled her away from Gladys' body and bedroom because Selvidge told Isringhausen Barton never pulled her back from Gladys' body and bedroom(Ex.247p.1050). Bradley's misstating Isringhausen's testimony repudiated Barton's defense by portraying that Selvidge had corrected her mistaken "confused" reporting to Hodges by reporting just the opposite to Isringhausen. The prejudice of Bradley's argument is accentuated by Selvidge's adamant testimony denying Barton pulled her away from Gladys' body and bedroom and her representing if she told Hodges something different it was explainable by her stress(Ex.247p.518,523,526). Furthermore, the fundamental problem with the finding the jury understood Bradley was arguing that Selvidge had told Isringhausen that Barton hadn't moved Selvidge back from Gladys' body and from the bedroom (29.15L.F.1007-08) is it was critical for the jury to believe exactly the opposite of this finding.

Reasonable counsel would've objected to Bradley's argument because his misstatements of Isringhausen's testimony about what Selvidge reported to Isringhausen about Barton having pulled Selvidge away from Gladys' body and bedroom expressly contradicted Barton inadvertently got contact blood on his clothes from pulling Selvidge away. *See Strickland*, *Storey*, *Butler*, *McCarter*. Barton was prejudiced because Bradley's argument, coupled with Selvidge's adamant denial that Barton had pulled her away, left the jury to conclude Barton didn't inadvertently get

blood on his clothing by pulling Selvidge away. *See Strickland*, *Storey*, *Butler*, *McCarter*.

This Court should order a new trial.

IX.

FAILURE TO CALL DR. MERIKANGAS

The motion court clearly erred denying counsel was ineffective for failing to present evidence from Dr. Merikangas Barton has significant congenital and trauma-based brain damage adversely impacting his intellectual abilities and predisposing him to violent impulsive acts because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Merikangas as maintaining residual doubt and presenting brain damage evidence were compatible and Barton was prejudiced because there is a reasonable probability had the jury heard Merikangas it would have voted life.

Counsel called only three penalty witnesses whose testimony, including cross-examination and objections totaled 17 pages(Ex.247p.1130-46). Effective counsel would've presented mitigating evidence through Dr. Merikangas that Barton has significant congenital and trauma-based brain damage adversely impacting his intellectual abilities and predisposing him to violent impulsive acts.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984).

Merikangas' 29.15 Testimony

Dr. Merikangas is a neurologist and psychiatrist who examined Barton and reviewed his brain scans(29.15Tr.264,270-71). Those exams and scans reflect Barton has severe congenital and trauma-based brain damage(29.15Tr.272-78,280,284-

97,300). In 1974, when Barton was 18, he sustained a severe skull fracture(29.15Tr.280-83). Barton's damage to his frontal lobe from the skull fracture predisposed him to impulsive violent actions(29.15Tr.302-06). How Barton handled a situation was circumstances dependent; he wasn't someone who consistently responded violently(29.15Tr.302-06). Merikangas reviewed family and friends' affidavits which reflected until Barton's skull fracture, he was a typical, nice person(29.15Tr.305-06). Barton's two prior assaultive convictions involved spontaneous violent episodes that could be linked to his trauma-based brain damage(29.15Tr.307-09).

Barton's congenital deficits reflect Fetal Alcohol Syndrome and were caused by maternal prenatal drinking(29.15Tr.294-95). The prenatal alcohol exposure impaired Barton's intellectual functioning and created attention deficit impairments(29.15Tr.303).

Barton's brain damage substantially impaired his ability to control behavior and to understand its consequences and he acted under extreme emotional disturbance(29.15Tr.314-15).

Counsels' Testimony

Kessler's "strategy" as to Barton's two prior assaultive convictions was to leave them alone and not make things worse(29.15Tr.467-69). Bruns hoped residual doubt caused the jury to vote life(29.15Tr.532-33).

Kessler and Bruns didn't call Merikangas believing his testimony would be inconsistent with innocence and residual doubt(29.15Tr.470-72,530-32,560-61).

Kessler didn't call Merikangas because Barton didn't like Merikangas and he deferred to Barton(29.15Tr. 472-73,488,491,500-01). Kessler and Bruns testified Merikangas wasn't called because he testified previously and Barton got death(29.15Tr.488-89,493,531).

Findings

Kessler testified Barton didn't want witnesses, like Merikangas, who suggested he committed the offense or for anyone to beg for his life(29.15L.F.994-95). Bruns didn't want the jury to hear Barton had an irresistible impulse(29.15L.F.1002-03).

Not calling Merikangas was strategic to focus on "residual doubt"(29.15L.F.1002-03,1018,1026). Barton didn't want Merikangas or an insanity defense and Merikangas' 1998 trial testimony was unpersuasive(29.15L.F.994-95,1002-03,1026).

Third Trial Penalty Evidence

In the third trial, counsel called Lucy Englebrecht and Donna Potts to testify they knew Barton through their prison religious ministry and had talked and prayed with him(Ex.242p.945-48,949-51). Barton's then wife, Pat Barton, and her daughter, Shirley Curbow, asked the jury spare Barton's life(Ex.242p.951-55). Neuro-psychologist, Dr. Cowan, testified Barton had organic brain damage, verified with MRI testing, and associated with his skull fracture(Ex.242p.960-80). On cross-examination, Cowan was attacked for not being an M.D.(Ex.242p.969-70)

Fourth Trial Penalty Evidence

Fourth trial counsel called Lucy Englebrecht and Donna Potts to again testify again about their religious ministry(Ex.244p.1002-13).

Counsel also called Barton's younger brother, Robert, and his aunt, Juanita Branan, who described how Barton had been level-headed and didn't get into trouble until his severe, 1974 head injury(Ex.244p.1013-23).

Merikangas testified about Barton's 1974 head injury and its consequences(Ex.244p.1024-40). Merikangas' exam and scan testing confirmed Barton had sustained significant brain damage from a skull fracture(Ex.244p.1040-74). Barton's clinical symptoms couldn't be faked(Ex.244p.1044-49). Barton's injuries explained how someone who'd been level-headed could have a changed personality and act rashly(Ex.244p.1063-64,1069-74).

Fifth Trial Penalty Evidence

Fifth trial counsel also called Englebrecht and Potts to again testify about their religious ministry(Ex.247p.1130-34,1137-39). Counsel also called Barton's then wife, Debbie, who married him after becoming a death row pen pal(Ex.247p.1143-45). No available brain damage evidence was presented.

Counsel Was Ineffective

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). Foregoing presenting evidence because it contains something harmful is unreasonable when its harm is outweighed by its helpfulness. *See Hutchison v. State*,150S.W.3d292,305(Mo.banc2004).

Here any harm in calling Merikangas was outweighed by the good. *See Hutchison.* Maintaining residual doubt and presenting brain damage evidence are compatible. Counsel could've presented and expressly told the jury they didn't agree with its guilt finding, but **respected** that verdict, and that is why they then were presenting evidence from Merikangas to mitigate **what the jury had found**. Not calling Merikangas to avoid irresistible impulse evidence (29.15Tr.530-32,560-61) was unreasonable. *See Butler* and *McCarter*. Merikangas was able to explain to the jury, in light of its guilt verdict, that Barton's actions should be mitigated because his brain damage predisposed him to impulsive violent actions(29.15Tr.302-06). Further, Merikangas could've presented mitigating evidence Barton has congenital intellectual impairment, Fetal Alcohol Syndrome, caused by his mother's prenatal drinking(29.15Tr.294-95,303).

The findings' reliance on Kessler's purported deference to Barton's wishes to not have anyone "beg" for his life (29.15L.F.994-95) is totally at odds with Kessler's closing argument devoted to "begging" for Barton's life. *See* Point XI.

One of capital counsel's primary duties is to neutralize aggravation. *Ervin v. State*,80S.W.3d817,827(Mo.banc2002). Counsels' head in the sand "strategy," hoping respondent didn't make hay with Barton's prior assaultive convictions, was unreasonable. *See Ervin*. Merikangas was able to explain how Barton's head trauma made him prone to spontaneous violent episodes, and thereby, mitigate his prior assaultive convictions(29.15Tr.307-09).

Counsels' purported aversion to repeating the same past trials' failed strategies doesn't square with them presenting the same witnesses called in the past. Two witnesses were the same prison ministry witnesses, Englebrecht and Potts(Ex.247 at 1130-42). The third was just a different wife, Debbie Barton(Ex.247 at 1143-45;Ex.242 at 951-53).

Merikangas testified at the fourth trial (Ex.244 at 1024-75), the same trial Judge Sims deemed unreliable because of Ahsens' pervasive Allen misconduct. To reject calling Merikangas because he testified at a trial counsel knew was fundamentally flawed with Ahsens' Allen misconduct(29.15Tr.488-89,493,531;29.15L.F.1002,1026), and therefore unreliable in result, defies logic.

A new penalty phase is required.

X.

MITIGATING WITNESSES - FAMILY

The motion court clearly erred denying counsel was ineffective for failing to present mitigating evidence available from Walter Barton's family members Juanita Branan, Marie Johnson, Joyce Rogers, Robert Barton, Mary Reese, and Ralph Barton Jr. because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have adduced through them evidence of the dysfunctional, abusive home in which Barton was raised and how Barton's behavior became impulsive following his skull fracture for consideration with Dr. Merikangas' findings (Point IX), and Barton was prejudiced because had the jury heard this evidence it would have voted life.

Barton's family members could've provided critical mitigating evidence about the abusive home Barton was raised in and how Barton's skull fracture adversely impacted his behavior. Had the jury heard this information it would've voted life.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984).

Juanita Branan

Juanita Branan is Barton's mother's sister, Barton's aunt(Ex.216p.4). Ralph Sr. and Anne had five children - Ralph Jr., Patricia Anne, Robert Lynn, Diane Rogers, and Walter(Ex.216p.4-5). Anne had affairs with other men such that Ralph Sr. wasn't Diane's father(Ex.216p.5,10-11). Ralph Jr. assumed the role of parenting his

siblings(Ex.216p.6-7). Anne was verbally and mentally abusive to the children(Ex.216p.8,10,25). Their home was filthy and roach infested(Ex.216p.8-9). Both Anne and Ralph whipped the children with objects(Ex.216p.9). Juanita had to physically stop Anne from assaulting Barton numerous times(Ex.216p.19).

After Barton's skull fracture his personality changed from calm and sweet to sometimes explosive(Ex.216p.12-13,28-29).

Marie Johnson

Marie Johnson is Anne's sister, Barton's aunt(Ex.214p.5). Marie recounted she was one of nine children and her mother and several of Marie's siblings, including Barton's mother, had significant mental disorders(Ex.214p.7-11). Marie recounted Barton's mother was especially harsh in how she treated Barton and blamed Barton for everything(Ex.214p.11-17,21). Barton's father, Ralph Sr., didn't intervene when Anne was abusive(Ex.214p.16). Anne had many affairs and as a result Ralph Sr. wasn't Barton's sister Diane's father(Ex.214p.17-20).

As a young child, Barton was well-behaved and didn't display anger or violent tendencies(Ex.214p.20-21).

Joyce Rogers

Joyce Rogers was Barton's aunt(Ex.213p.1). Barton's father, Ralph, and mother, Anne, beat the children with objects and Anne had many affairs(Ex.213p.1-4). Barton's sister, Diane, was fathered by someone Anne had an affair with(Ex.213p.2).

Robert Barton

Robert Barton is Barton's younger brother(Ex.218p.1). Their mother had many affairs and as a result their sister Diane's father wasn't Barton's father(Ex.218p.1-2). Both parents whipped the children with objects(Ex.218p.4).

Barton behaved differently following his head injury, displaying impulsive, angry behavior(Ex.218p.3-4).

Mary Reese

Mary Reese is Barton's mother's sister, Barton's aunt(Ex.217p.3-4). Ralph Sr. and Anne beat the children with objects and Anne threatened them with what Ralph Sr. would do(Ex.217p.9-10). Before Barton sustained the skull fracture he was even tempered and non-violent(Ex.217p.15).

Ralph Barton Jr.

Ralph Barton Jr. is Barton's brother(Ex.219p.3). Growing-up Barton was non-violent(Ex.219p.6). After Barton's head injury, he just wasn't the same and his mental processing was negatively impacted(Ex.219p.9-10).

Ralph contacted the prison about 10-12 years before and was told Barton was executed and all Barton's family then believed he was dead(Ex.219p.11-12).

Counsels' Testimony

Kessler testified Barton didn't want people "begging for his life"(29.15Tr.483). Bruns testified none were called because they couldn't offer anything on residual doubt/innocence(29.15Tr.542-43).

Findings

Counsel made the strategic decision not to use witnesses who hadn't been persuasive or effective previously and none would've altered the result(29.15L.F.984-85,1025-27). Barton told counsel he didn't want anyone begging for his life(29.15L.F.1026-27). Marie Johnson's contact was limited and she couldn't have provided significant information(29.15L.F.984-85).

Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000). Counsel are obligated to investigate and present evidence of impaired intellectual functioning, since this is "inherently mitigating." *Hutchison v. State*,150S.W.3d292,297(2004). *See also*, *Tennard v. Dretke*,542U.S.274,287(2004)(same).

Failing to interview witnesses relates to preparation, not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Lack of diligent investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

In *Williams v. Taylor*,529U.S.362,369,395(2000), trial counsel presented mitigating evidence through the defendant's mother, his friends, and a psychiatrist, but failed to conduct investigation that would've uncovered extensive abuse and deprivation evidence. Williams was denied effective assistance under *Strickland*.

*Id.*396-98. Likewise, in *Rompilla v. Beard*,545U.S.374,390-93(2005) counsel was ineffective in failing to uncover and present abuse evidence. In *Rompilla*, the Court noted counsel had found Rompilla to have been uninterested in helping uncover helpful abuse evidence and even actively obstructed obtaining it, but still counsel was ineffective. *Id.*381.

Counsel was on notice the abuse and head injury evidence was available from Joyce Rogers (Ex.213), Robert Barton (Ex.218), Mary Reese (Ex.226), and Ralph Barton Jr. (Ex.227) because the file contained their affidavits done for Barton's previous postconviction action.

Reasonable counsel would've called Juanita, Marie, Joyce, Robert, Mary, and Ralph Jr. who could've presented the dysfunctional, abusive environment Barton was raised in and how Barton's mental functioning associated with self-control was compromised following his skull fracture. *See Wiggins*, *Hutchison*, *Tennard*, *Williams*, and *Rompilla*. Barton was prejudiced because there's a reasonable probability had the jury heard this evidence it would've voted life. *Id.*

The independent evidence of Barton's altered behavior following his severe head injury would've provided support and verification for Merikangas' conclusions. *See* Point IX.

Juanita Branan and Robert Barton testified only at the fourth trial's penalty phase (Ex.244p.1013-23) about how Barton was level-headed and didn't get into trouble until he suffered a severe 1974 head injury and the remaining family witnesses never testified at the prior trials(Ex.242p.945-55,960-80;Ex.244p.995-

1075;Ex.247p.1130-46). To reject calling Branan and Robert when they testified only at the fourth trial, and knowing that trial was fundamentally flawed in result because of Ahsens' Allen misconduct, was unreasonable. *See Butler* and *McCarter*.

Counsels' purported deferring to Barton's not wanting anyone "begging" for his life is totally contradicted by Kessler's closing argument "begging" for Barton's life. *See* Point XI. Moreover, in *Rompilla*, counsel was ineffective where the defendant actively obstructed counsel in presenting abuse evidence so that failing to present abuse evidence because Barton, who has brain damage, didn't want people "begging" for his life was unreasonable. *See McCarter* and *Butler*. Furthermore, like as discussed as to Merikangas (see Point IX), presenting mitigation was not inconsistent with residual doubt/innocence.

A new penalty phase is required.

XI.

RAMBLING INCOHERENT NON-DEFENSE PENALTY CLOSING ARGUMENT

The motion court clearly erred denying counsel was ineffective in making a rambling, incoherent penalty argument advocating a prohibited jury nullification non-defense, capital punishment's "moral repugnancy" and "begging" for Barton's life, expressly contradicting counsel's professed opposition to mitigation "begging" for Barton's life (Point X), because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have argued Barton's mitigating, redeeming qualities warranting life, and not have argued imposing death would lower the jurors to the level of "the Walter Bartons of the world." Barton was prejudiced because had the jury been given evidence-based reasons it would have voted life.

Counsel's penalty closing argument was a rambling, incoherent presentation urging a non-defense, jury nullification. The argument was devoid of arguing mitigating, redeeming qualities for why the jury ought to impose life. Instead, counsel's argument was an affront to the jurors' own sensibilities.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). For strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v.*

State,108S.W.3d18,25(Mo.App.,W.D.2003);*State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994).

Penalty Closing

Kessler argued people ask how can he represent capital defendants(Ex.247p.1153). He tells people what he told Freter "when she was a kid" and Bruns "when he was a law student"(Ex.247p.1153). Kessler tells people he does what he does because "ask[ing] for mercy" is what he was "trained to do"(Ex.247p.1153). Kessler told the jury it's "the highest calling" for him "to **beg** for somebody's life"(Ex.247p.1153)(emphasis added).

Kessler told the jury he does what he does because the death penalty "is a morally repugnant punishment"(Ex.247p.1153-54). The "legislation" cannot compel the jury "to do something which is morally repugnant"(Ex.247p.1153-54).

Kessler said he's done capital cases for "twenty-some-odd years," since he was a "kid," and that he was no longer twenty-seven, when he did his first(Ex.247p.1154). Kessler said he hadn't "learned much more" since he did his first capital case "but standing up and **begging** for somebody's life is the greatest thing, the greatest calling, that [he] can imagine anybody having."(Ex.247p.1154)(emphasis added).

Kessler argued respondent's treatment of defense penalty phase witnesses was "morally repugnant" because it cast their feelings about Barton as not as important as Selvidge's feelings about her grandmother(Ex.247p.1155-56). Kessler stated he never understood how a prosecutor can argue a victim deserved life, but the person who

killed them deserved death(Ex.247p.1156). According to Kessler "[n]ot even our legislature says that's the way it is."(Ex.247p.1156).

The "mitigating circumstances" Kessler identified were the defense penalty witnesses loved Barton(Ex.247p.1156-57).

Kessler stated he regards himself as "a relatively tough guy" and there's "not much that shocks [him]" because he's "seen it all"(Ex.247p.1157). That was followed by Kessler telling the jury he knew Freter "since she was a little girl" and her father was Kessler's teacher(Ex.247p.1157). Kessler added he'd known Bruns since Bruns was a law student(Ex.247p.1157). Kessler continued there's nothing he'd prefer being remembered for "than **begging** for the life" of a capital defendant(Ex.247p.1157)(emphasis added).

Kessler stated no one can bring Gladys back, but the jurors shouldn't "cheapen" themselves(Ex.247p.1157). The jurors needed "to be true" to the things they teach their children and to things that made them who they are(Ex.247p.1157-58).

The jurors shouldn't follow the Old Testament's eye for an eye and besides even the legislature has recognized that it cannot do that(Ex.247p.1158). An eye for an eye lowers oneself and doesn't work because our society isn't one of "savages" or "barbarians"(Ex.247p.1158).

The jurors needed "to be better" than the person they were judging in Barton, "better than the worst in our society," and "better than the savages and the barbarians

of this world"(Ex.247p.1159). The jurors shouldn't "stoop to the level of the lowest of society"(Ex.247p.1159).

Kessler told the jurors their decision wasn't about Barton, but about themselves, and whether they can show the world they're "better than" Barton by showing Barton "mercy" that Barton didn't show Gladys(Ex.247p.1160). The decision they made would be one through which they'd "always be judged" by Barton(Ex.247p.1160). By not imposing death the jurors themselves will "continue to have a value" and "worth"(Ex.247p.1161). Kessler asked the jurors to "be better than Walter Barton, and the Walter Bartons of the world"(Ex.247p.1161).

Kessler's Testimony

Kessler testified he elected not to "have people coming in and whining and **begging** for [Barton's] life" because that was Barton's preference(29.15Tr.482-83)(emphasis added).

Findings

The findings state counsel gave the jury reasons not to impose death by asserting they were better than that(29.15L.F.1029).

On an inseparable subject, the findings state Kessler deferred to Barton's wishes regarding Barton not wanting penalty witnesses called who merely were "begging for his life"(29.15L.F.1001).

Counsel Was Ineffective

In *State v. Diggs*,223Cal.Rptr.361,366-67(Ct.App.3rdDist.Ca.1986), counsel was ineffective for presenting a largely incoherent closing argument and arguing a non-defense.

Jury nullification is improper. *State v. Hunter*,586S.W.2d345,347-48(Mo.banc1979). *See Jurek v. Texas*,428U.S.262,279(1976)(White, J. concurring in judgment)(Texas capital statute didn't violate Eighth Amendment as "it should not be assumed that juries will disobey or nullify their instructions."). That prohibition is in keeping with the presumption a jury follows the law as it's given to them by the circuit court's instructions. *State v. Johnson*, 316S.W.3d491,498(Mo.App.,W.D.2010). In *State v. Allen*,702S.W.2d530,531,533-34(Mo.App.,E.D.1985) a prosecutor's objection was properly sustained to a jury nullification argument.

Kessler argued for jury nullification the non-defense that capital punishment is "morally repugnant"(Ex.247p.1153-54,1156). *Cf. Diggs*. The fallacy of this argument is no one selected to serve on the jury held such a view because if they had, then they would've been stricken for cause. *See,e.g.,Wainwright v. Witt*,469U.S.412,423(1985)(jurors morally opposed to capital punishment are unqualified).

Kessler argued it was "morally repugnant" for the prosecutor to discount the defense penalty phase witnesses' feelings about Barton because Selvidge's feelings about her grandmother had greater worth(Ex.247p.1155-56). Kessler continued this theme, questioning how prosecutors can argue a victim deserved life while the person

who killed them deserved death(Ex.247p.1156). Despite the Missouri Legislature having embraced capital punishment, Kessler argued "[n]ot even our legislature says that's the way it is."(Ex.247p.1156). Arguing the non-defense moral repugnancy was ineffective and had respondent objected its objection would've been sustained. *See Diggs* and *Allen*.

In *Kubat v. Thieret*,867F.2d351,366-69(7thCir.1989) counsel was ineffective for failing to present available mitigating evidence and making a rambling, incoherent closing argument. The two, whether considered independently or together, required a new penalty phase. *Id.*366-69. Rather than present mitigating evidence, Kubat's counsel opted to present a plea for mercy in closing argument. *Id.*366-69. That argument was "a rambling, incoherent discourse" that may have actually committed the jury's resolve to impose death. *Id.*368. The closing argument included references to the Old Testament's "an eye for an eye" vengeance, the New Testament, and asked the jury choose between Kubat and the victim. *Id.*368. Counsel was ineffective because there was no effort to present Kubat as a human being that emphasized his mitigating, redeeming qualities. *Id.*368-69.

Kessler's closing argument, likewise, was a "a rambling, incoherent discourse" that actually committed the jury's resolve to impose death. *See Kubat*. In advocating for a mitigated punishment other than death, the focus must be on humanizing a defendant through explaining his life in a manner that elicits compassion, understanding, and sympathy. *See* John M. Fabian, *Death Penalty Mitigation And*

The Role of the Forensic Psychologist,27Law & Psychol.Rev.73,119-20(Spring 2003).

Kessler described how he regarded himself as "a relatively tough guy" and that there is "not much that shocks [him]" because he has "seen it all"(Ex.247p.1157). Whether Kessler is a "tough guy," for whom nothing shocks his sensibilities because he has "seen it all," didn't ingratiate himself to the jurors or advance Barton's cause. This was a jury who had had its sensibilities shocked and accosted by Selvidge's traumatization by the carnage she found(Ex.247p.517-18) and brutality of Gladys' wounds documented in photos and blood stained items(*See, e.g.*,Ex.247p.493-95,581,693,864-65). Such a cavalier trivializing served only to incense the jurors and heighten their own traumatization and outrage, predisposing them to death. *Cf. Kubat*. Coupling such argument with the failure to call meaningful mitigation witnesses denied Barton effective assistance. *Cf. Kubat*.

Having inflamed the already raw emotion the jurors must have felt from learning about the brutality of Gladys' death, Kessler then proceeded to insult their personal integrity. Kessler told the jurors voting for death would "cheapen" them and they needed "to be true" to values they taught their children(Ex.247p.1157). These jurors didn't believe that imposing death would constitute a flaw in anyone's character, much less their own, because in voir dire they acknowledged their willingness to consider death. *Wainwright v. Witt,supra.*

Kessler assaulted the jurors' integrity telling them voting for death, a legally permissible alternative, made them no "better" than Barton who committed the legally

prohibited act of murder(Ex.247p.1159). The assault on the jurors' integrity demeaned Barton's own humanity, rather than humanizing him. Kessler told the jurors they needed "to be better" than the person they were judging in Barton, "better than the worst in our society," and "better than the savages and the barbarians of this world"(Ex.247p.1159). Casting Barton as among "the worst" in our society, no different than "savages and barbarians," and equating the jurors with the same, if they voted for death, isn't a reasonable strategy. *See Kubat, Butler, and McCarter*. Telling the jurors they shouldn't "stoop to the level of the lowest of society"(Ex.247p.1159) and demeaning Barton's humanity wasn't reasonable, and was squarely at odds with eliciting compassion, understanding, and sympathy. *See Butler*, *McCarter*, *and* Fabian, *Death Penalty Mitigation*.

The assault on Barton's humanity and equating the jurors' morality with Barton's immorality, if they voted for death, continued when Kessler told the jury their decision wasn't about Barton it was about themselves and whether they can show the world they're "better than" Barton by showing Barton the "mercy" Barton didn't show Gladys(Ex.247p.1160). The jury's punishment verdict had nothing to do with the jurors' character, and wasn't a contest about whether the jury was "better than" Barton. Nor was it a decision about which they'd "always be judged" by Barton(Ex.247p.1160). The jurors weren't there to be "judged" by anyone, and this argument must've had only one impact on them, making them more committed to imposing death. *See Kubat*. Likewise, Kessler's argument that by not imposing death the jurors themselves will "continue to have a value" and "worth"(Ex.247p.1161)

demeaned the jurors' and committed them to imposing death. *See Kubat*. Kessler's concluding comments admonished again the jury to "be better than Walter Barton, and the Walter Bartons of the world"(Ex.247p.1161).

Kessler did tell the jury that it ought to give Barton "mercy"(Ex.247p.1153-1161). But giving a capital defendant mercy requires highlighting evidence why mercy is **deserved.** *State v. Rousan*,961S.W.2d831,851(Mo.banc1998). *See also*, *State v. Davis*,290P.3d43,63(Wash.2012)(mercy "is a reasoned moral response to evidence that the jury may take into account."). The so called "mitigating circumstances," warranting mercy discussed in a single paragraph covering one-half page of transcript were three witnesses whose relationship was founded on ministering to prison inmates, one of whom married Barton, and all of whom said they loved Barton(Ex.247p.1156-57). Kessler didn't argue how mercy was deserved. *See Rousan*. His rambling incoherency resulted from his failure to present any truly mitigating witnesses who provided any evidence explaining Barton's life in a manner that elicited compassion, understanding, and sympathy. *See* Fabian, *Death Penalty Mitigation; Kubat;* Points IX and X.

In *Rousan*, this Court indicated prosecutors aren't to suggest a jury is weak if it exercises mercy and votes life. *Rousan*,961S.W.2d at 851. Kessler took an equally inappropriate offensive tact, that served only to alienate the jury, excoriating them that voting for death made them no "better" than Barton(Ex.247p.1161).

Kessler's argument rambled about the Old Testament's vengeance of an "eye for an eye"(Ex.247p.1158). In *Kubat* there was the same "eye for an eye" ineffective ramblings. *See Kubat.*

Kessler asserted he didn't call mitigation witnesses who would've been "whining and **begging** for [Barton's] life" (emphasis added)(29.15Tr.482-83), yet his closing argument asserted he views his role as "**begging**" for capital defendants' lives(Ex.247p.1153-54,1157). If Kessler was going to adhere to Barton's alleged preference of not having people "begging" for his life, as Kessler testified (29.15Tr.482-83), then he shouldn't have engaged in a closing argument devoted to "begging" for Barton's life(Ex.247p.1153-54,1157).

Reasonable counsel wouldn't have made an incoherent, rambling argument advocating a non-defense, jury nullification. *See Strickland, Allen*, and *Kubat.* Further, reasonable counsel who claimed to not want to present mitigation witnesses to "beg" for Barton's life, wouldn't have made a closing argument devoted to "begging" for Barton's life. *See Strickland* and *Kubat.* Barton was prejudiced because the jury wasn't given reasons, supported with evidence, why it should vote life and exercise mercy. *See Strickland and Kubat.* Instead, the jury was admonished to be better than Barton. *See Strickland and Kubat.*

This Court should order a new penalty phase.

XII.

RESPONDENT'S FAILURE TO DELIVER ON OPENING STATEMENT ASSERTIONS

The motion court clearly erred denying counsel was ineffective in failing to request a mistrial at the close of all respondent's guilt evidence because Barton was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have requested a mistrial because in opening statement the jury heard four snitches would testify Barton admitted killing Gladys and one who would testify, but did not, that Barton said he licked her blood and liked its taste when the jury heard from only one, Allen, who Judge Sims previously found lied, testify Barton admitted killing Gladys. Barton was prejudiced as such outside the evidence representations caused the jury to convict and vote death.

Trial counsel was ineffective when they failed to request a mistrial when respondent failed to deliver on its representations the jury would hear from four snitches alleged admissions Barton made, including one that he had licked Gladys' blood and liked its taste.

Ineffectiveness claims are reviewed under *Strickland v. Washington*,466U.S.668,687(1984). For strategy to be a proper basis to deny relief, the strategy must be reasonable. *Butler v. State*, 108S.W.3d18,25(Mo.App.,W.D.2003); *State v. McCarter*,883S.W.2d75,77-79(Mo.App.,S.D.1994).

A. Snitch Witness History

1. Second Trial

At the second trial, Arnold was respondent's only testifying snitch(Ex.241p.1). Arnold testified Barton admitted stabbing and killing Gladys(Ex.241p.324-25).

2. Third Trial

Arnold testified similarly at the third trial(Ex.242p.780-81). Ahsens also called snitch Ellis to testify he heard Barton say he was going to have Arnold killed for claiming Barton had admitted killing Gladys(Ex.242p.804-06). Allen testified at the third trial Barton admitted having killed Gladys because he was angry with Gladys in the same way he was angry with Allen, but didn't specify a particular number of times Barton made such a statement(Ex.242p.808-13). Dorser testified Barton admitted killing Gladys and Barton said he licked Gladys' blood and liked its taste(Ex.242p.815-16).

Ahsens concluded his third trial initial guilt and rebuttal closing arguments urging the jury convict Barton based on the four snitches' testimony(Ex.242p.865-66,890-91).

3. Fourth Trial

Arnold was called outside the jury's presence to testify that if he were called to testify then he'd refuse(Ex.244p.688-89). Arnold's third trial testimony was read to the jury(Ex.244p.727-53 and reading from Ex.242p.778-802).

Ellis testified that while confined in Christian County's Jail he heard Barton say he was going to have Arnold killed(Ex.244p.766-67).

Allen testified that while she was confined in Lawrence County's Jail that Barton threatened her on two occasions, stating he'd kill Allen like he'd "killed her"(Ex.244p.770-71).

Dorser testified he was confined in Lawrence County's Jail with Barton and Barton admitted stabbing and killing Gladys and said he licked Gladys' blood and liked its taste(Ex.244p.776,778).

Ahsens argued in initial guilt and Orr argued in rebuttal Barton was guilty based on the four snitches' testimony and both highlighted Dorser's "licked and liked"(Ex.244p.899-900,927-28). Orr specifically argued Barton told Arnold he killed Gladys(Ex.244p.924,927).

B. Fifth Trial - Opening

Bradley told the jury four inmates, who were confined with Barton, would testify(Ex.247p.441). Arnold would testify Barton admitted "he killed an old lady by cutting her throat, stabbing her, cutting an X on her"(Ex.247p.441). Ellis would testify he heard Barton say that Barton was going to have Arnold killed because Arnold had previously testified against him(Ex.247p.441-42). Allen would testify Barton threatened to kill her like he did the other woman(Ex.247p.442). Dorser would testify Barton said he stabbed Gladys and "licked and liked" her blood's taste(Ex.247p.442).

C. Fifth Trial Guilt Proceedings

Cleek called Dorser outside the jury's presence(Ex.247p.710-17). Dorser reported having sustained a head injury and didn't remember having testified previously against Barton or remember anything about Barton(Ex.247p.710-17).

Cleek called Arnold outside the jury's presence(Ex.247p.717). Arnold admitted he committed perjury and had entirely made-up Barton admitted killing Gladys and he intended to invoke the Fifth(Ex.247p.719-20,722-23).

Allen testified before the jury that "at least five times" Barton threatened to get out of his cell and kill her like he'd killed an old lady(Ex.247p.933-34).

D. Counsels' Testimony

Bruns testified that at the close of respondent's guilt case a mistrial should've been requested based on respondent's opening representations about the three uncalled snitches(29.15Tr.520,554-55). Bruns wouldn't have asked respondent's opening be stricken or argued in closing respondent hadn't delivered on opening because that would've highlighted the matter(29.15Tr.520,554-55).

Kessler testified Bruns was responsible for seeking any opening statement corrective action(29.15Tr.442,444-46;Ex.247p.443).

E. Findings

The jury was instructed opening statements aren't evidence and the law assumes the jury did that(29.15L.F.1027-28). Counsel had no way to know which witnesses respondent would actually call and wasn't ineffective(29.15L.F.1027-28). When the state promises it'll present evidence, but doesn't, then that's detrimental to it(29.15L.F.1027-28). Respondent's opening statement was made with expectation

Arnold, Dorser, and Ellis would be called, but during trial respondent decided not to(29.15L.F.1027-28).

F. Counsel Was Ineffective

This Court has recognized snitches are notoriously unreliable. *See State v. Beine*,162S.W.3d483,485(Mo.banc2005). Judge Sims already found Allen had lied.

Failure to make timely proper objections to arguments can constitute ineffective assistance. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(counsel ineffective failing to object to penalty arguments asserting facts outside record including assertion killing was most brutal in that County's history). The *Storey* argument was improper and counsel was ineffective because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." *Id*.901. A prosecutor presenting facts outside the record is highly prejudicial "because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Id*.901(relying on *Berger v. United States*,295U.S.78,88(1935)). *See also, Peterson v. State*,149S.W.3d583,587-89(Mo.App.,W.D.2004)(counsel ineffective for failing to object to argument outside record relying on *Storey's* discussion of prosecutorial duty to do justice).

Bruns acknowledged that at the close of all of respondent's guilt evidence he should've requested a mistrial when respondent didn't produce three of the four promised snitches(29.15Tr.520,554-55). After respondent had represented it would call four snitch witnesses, but called only one, reasonable counsel would've objected and requested a mistrial at the close of respondent's guilt evidence. *See Storey*,

Peterson, and *Strickland*. Respondent's opening was especially prejudicial, despite an instruction that opening isn't evidence(29.15L.F.1027-28), because the prosecutor was an unsworn witness who implied he had special knowledge of Barton's guilt. *See Storey* and *Peterson*.

The prejudice to Barton of the opening statement here is underscored by how respondent relied on in the previous trials in jury argument, the cumulative reliability of the multiple snitch testimony and Dorser's "licking and liking." The sheer number of snitches was used to make respondent's case appear more compelling and credible in a weak case. As Judge Dandurand observed, Barton was "prejudiced" because respondent kept improving its case by adding snitches(Ex.247p.45).

In Barton's third trial, Ahsens concluded initial guilt and rebuttal closing arguments urging the jury convict Barton based on the four snitches because their sheer number proved Barton's guilt(Ex.242p.865-66,890-91).

In Barton's fourth trial, Ahsens in initial guilt and Orr in rebuttal argued Barton was guilty based on the four snitches' testimony and both highlighted Dorser's "licked and liked"(Ex.244p.899-900,927-28). Orr particularly highlighted Barton told Arnold that he killed Gladys(Ex.244p.924,927).

Like the closing arguments in the prior trials, the use in opening of four snitches and Dorser's highly inflammatory statement made respondent's case appear more compelling than it otherwise was in a weak case. *Cf. Peterson*. Moreover, the image of someone "licking and liking" the taste of a victim's blood alone creates such an inflammatory offensive emotional image that Barton was prejudiced. *Cf. Storey*

(County's most brutal killing). Likewise, the image of someone "cutting an X" on Gladys' body is an image that shocked the jurors' sensibilities.

This isn't a case where the failure to deliver certain evidence mentioned in opening is detrimental to respondent(29.15L.F.1027-28). As Bruns explained, he didn't move to strike the opening or argue in closing respondent's failure to deliver what it promised, because that would've highlighted respondent's representations(29.15Tr.520,554-55).

Reasonable counsel would've requested a mistrial at the close of all respondent's guilt evidence. *See Storey*, *Peterson*, and *Strickland*. Barton was prejudiced because injecting the idea the jury would hear admissions from four snitches, including Dorser's "licking and liking" and Arnold's "cutting an X" were highly prejudicial. *See Storey*, *Peterson*, and *Strickland*.

A new trial is required.

XIII.

REPEATED PROSECUTORIAL MISCONDUCT/NEGLIGENCE

The motion court clearly erred denying the claim death against Barton should be prohibited because Barton was denied due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV, in that Barton's death sentence is premised on events from 1991 and the cause of respondent repeatedly seeking death against Barton and him being under a death sentence so long is respondent's repeated deliberate misconduct and sometimes negligence.

The events at issue happened in October, 1991. Respondent's continued deliberate misconduct, and sometimes negligence, has caused it to seek death repeatedly against Barton who's been living under a death sentence more than twenty years. That violates Barton's rights to due process and to be free from cruel and unusual punishment.

The findings contain a generalized statement Barton failed to prove his claim(29.15L.F.1031). The record, however, is replete with evidence why imposing death should be foreclosed. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

In *Lackey v. Texas*,514U.S.1045,115S.Ct.1421(1995), Justice Stevens authored a denial of certiorari memorandum, joined by Justice Breyer, on the question of

whether spending seventeen years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Stevens wrote the question's novelty merited future review. *Id.*1421. Lackey's arguments found strength in other countries that have concluded execution after "inordinate delay" can constitute cruel and unusual punishment. *Id.*1422. Stevens noted it may be appropriate to distinguish between delays:

> resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) **negligence or deliberate action by the State**.

*Id.*1422(emphasis added). *See also, Knight v. Florida*,528U.S.990,120S.Ct.459,461,464(1999)(Breyer, J dissenting from denial of certiorari)(discussing length of time spent on death row and its possibility of violating the Eighth Amendment because of state failure to comply with Constitution); *Valle v. Florida*,132S.Ct.1,1-2(2011) (Breyer, J dissenting from denial of certiorari)(discussing length of time on death row and possibility of executing innocent person).

The reasons Justices Stevens and Breyer have identified for why "inordinate delay" might violate the Eighth Amendment epitomize Barton's case. *See Lackey*. Barton's case reflects pervasive, deliberate prosecutorial misconduct, and sometimes negligence, characterized by respondent's failure to comply with the Constitution's demands in a case where there are serious questions respondent is seeking to execute the wrong person. *See Lackey*, *Knight*, and *Valle*.

The first trial was mistried because Ahsens hadn't endorsed anyone. *State v. Barton*,936S.W.2d781,782(Mo.banc1996). The second trial's jury hung. *Id.*782. After the second trial, Ahsens sent his juror Smalley note with Barton's prior convictions and booking picture(Ex.251). The third trial was reversed because Ahsens objected to defense counsel's argument challenging respondent's timeline. *Id.*782-88.

The fourth trial's 29.15 reversal is noteworthy for Ahsens' concealment of exculpatory Allen evidence which respondent didn't appeal. Bruce's e-mail to Ahsens attributing illegitimate, injudicious motives to Judge Sims' granting relief, reflects the state's pervasive contemptuous attitude for adhering to its duty "that justice shall be done" and evidences a willingness to strike "foul blows." *See Berger v. United States*,295U.S.78,88(1935).

The evidence presented in this 29.15, reveals even more of respondent's deliberate misconduct and sometimes negligence. Until uncovered in this 29.15, Ahsens suppressed Arnold's deal for "special visits" with "alone time" for sex with his girlfriend. Point I. Selvidge's harassing call to Harrel that she was then having sex with Harrel's boyfriend and its associated charges weren't disclosed. Point II. The Horton interview notes discrediting respondent's timeline were never disclosed. Point III. In opening, Bradley told the fifth trial's jury it'd hear four snitches and he only presented one and he didn't call one who Bradley represented would testify Barton said he "licked and liked" Gladys' blood and didn't call another who'd say Barton admitted "cutting an X" on Gladys. Point XII. Bradley misrepresented in

closing argument Selvidge told Officer Isringhausen Barton didn't pull her away from Gladys' body and bedroom and that argument seriously discredited the defense's blood transfer explanation. Point VIII.

This pervasive state misconduct, and sometimes negligence, is the kind of case history Justices Stevens and Breyer suggested violates the Eighth Amendment. *See Lackey*, *Knight*, and *Valle*. This Court should reverse Barton's conviction and sentence and order respondent prohibited from re-seeking death. At minimum, this Court should reverse Barton's death sentence and impose life.

CONCLUSION

For the reasons discussed, this Court should order the following: (a) Points II through VIII and XII - a new trial; (b) Points IX through XI - a new penalty phase; (c) Point I - impose life without parole or reverse and dismiss the charges with prejudice; and (d) Point XIII - a new trial where seeking death is prohibited or reverse death and impose life without parole.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,962 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in November, 2013. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 7th day of November, 2013, on Assistant Attorney General Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
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